92-850

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH W. TEAGUE and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as Representatives of a Nationwide Class Consisting of 150,290 Lifetime Partners and of 27,839 Persons Who Have Partially Paid for Lifetime Partnerships,
Petitioners

v.

EMPLOYERS REINSURANCE CORPORATION,
Respondent

JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE,
Defendants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in critical aspects of summary judgment left unresolved by this Court in *Celotex*, *Matsushita*, and *Anderson*, the court below conflicted with other circuits in sustaining summary judgment against the PTL Lifetime Partner class?

A. Whether, contrary to the distinction in *Celotex* between the summary judgment standard where the moving party lacks and has the burden of persuasion at trial, the court below erroneously imposed on the nonmoving party the burden it would have if it had the burden of persuasion at trial (a burden which the nonmoving PTL Lifetime Partner class would lack and the moving insurer actually would have), following inconsistent dicta in *Matsushita* that have become a point of confusion in other circuits?

B. Whether, contrary to this Court's holding in *Anderson* that "the judge's function is not himself to weigh the evidence," the court below weighed the evidence and thereby concluded that Employers Reinsurance would win at trial and should win on summary judgment, relying on inconsistent language in *Anderson* and *Matsushita*, which has become a point of confusion in the circuits?

C. Whether, contrary to this Court's rejection in *Celotex* of the argument that "the nonmoving party must produce evidence in a form that would be admissible at trial," the court below excluded and ignored the Lifetime Partner Class's evidence that it found inadmissible (mistakenly), and thereby excluded and ignored affidavits of experts and affidavits offering insurer documents that demonstrated genuine issues of material fact, following inconsistent language in *Anderson* and *Matsushita*, which has become a point of confusion in the circuits?

II. Whether, in making a priori assumptions contrary to settled rules of insurance policy construction, the court below conflicted with this Court and other circuits and the North Carolina Supreme Court, and followed a too-frequent pattern of sustaining summary judgment based on handicapped predictions about the preponderance of evidence at trial that the PTL Lifetime Partner class would present?

A. Whether the perfunctory sustaining of summary judgment was contrary to this Court's and other circuits' rule that "significance must be given to each word" in any insurance policy and all evidence "must be viewed in the light most favorable" to the nonmoving party, and whether following that rule shows coverage of the PTL Lifetime Partner Class's claims or at least ambiguity requiring trial?

B. Whether the perfunctory sustaining of summary judgment was contrary to this Court's and other circuits' rule that extrinsic evidence must be considered to decide whether there is latent ambiguity, and whether following that rule shows coverage of the PTL Lifetime Partner Class's claims or at least ambiguity requiring trial?

C. Whether the perfunctory sustaining of summary judgment was contrary to this Court's and other circuits' rule that extrinsic evidence may be used to show the circumstances of entering the policy, the insurer's practices, and industry practices, and whether following that rule shows coverage of the PTL Lifetime Partner Class's claims or at least ambiguity requiring trial?

LIST OF PARTIES

The parties to the proceedings below were the petitioner PTL Lifetime Partner class (certified by the district court), the co-defendants Jim Bakker, David Taggart, and Aimee Cortese, and the respondent Employers Reinsurance Corp.

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OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unreported, and is reprinted in the appendix at A-1 *infra*. The memorandum opinion of the United States District Court for the Western District of North Carolina is unreported, and is reprinted in the appendix at A-9 *infra*.

JURISDICTION

Federal jurisdiction exists under 28 U.S.C. § 1332. Summary judgment was entered on October 17, 1991, with a Rule 54(b) judgment on November 14, 1991. The Fourth Circuit affirmed on August 14, 1992, and denied rehearing and rehearing en banc on October 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1291 is quoted in the appendix.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

Employers Reinsurance (ERC) filed this declaratory judgment action to determine whether its "Multimedia Liability Policy" covers the $129,747,618 judgment against Jim Bakker obtained by the certified class of PTL Lifetime Partners for common law fraud. The district court denied the Lifetime Partners' motion to intervene, and the Fourth Circuit reversed. *Teague v. Bakker,* 931 F.2d 259, 260-61 (4th Cir. 1991). The district court then entered summary judgment against the Lifetime Partners, and a panel of the Fourth Circuit affirmed, with rehearing en banc denied.

B. STATEMENT OF THE FACTS

The 150,000 members of the PTL Lifetime Partner Class are people who made non-deductible investments averaging $1,000 for Partnerships offering three free nights annually at Heritage U.S.A. The Class responded to statements by Jim Bakker in brochures pub-

lished and mailed to millions of people, and over television programs broadcast to millions of people. This case involves the rights of those 150,000 victims to collect under applicable insurance, which PTL and Bakker bought, and which has not paid a dime to anyone.

1. **Basis of the $129 Million Judgment in Jim Bakker's Oversales and Looting**

The description in the earlier appellate opinion is correct:

> Bakker planned to finance these projects by selling lifetime partnerships. He offered eleven different partnership programs ranging in cost from $500 to $10,000. Eight of the partnerships promised benefits that included annual lodging in one of the Heritage Village facilities. In January 1984, appellant began using the mail to solicit lifetime partners. Also, from February 1984 through May 1987, Bakker used broadcasts carried on the PTL Television Network and various commercial affiliates to solicit lifetime partners. Many of these partners drew on meager incomes to purchase Heritage Village lodging benefits. Appellant raised at least $158 million through the sale of approximately 153,000 partnerships with lodging benefits.
>
> Bakker promised television viewers that he would limit the sale of partnerships to ensure that each partner would be able to use the facilities annually. Appellant, however, oversold the partnerships. He promised, for instance, to limit the sale of Grand Hotel partnerships to 25,000 but actually sold 66,683. In addition, Bakker used relatively few of the funds solicited from the partners to construct promised facilities. In fact, of the proposed Heritage Village facilities, only the Grand Hotel and one bunkhouse were actually completed. Instead, Bakker used partnership funds to pay operating expenses of the PTL and to support a lavish lifestyle. This extravagant living included gold-plated fixtures and a $570 shower curtain in his bathroom, transportation in private jets and limousines, an air-conditioned treehouse for his children and an air-conditioned doghouse for his pets. This combination of overselling partnerships and diverting partnership proceeds meant that the overwhelming majority of the partners never received the lodging benefits Bakker promised them.

United States v. Bakker, 925 F.2d 728,731-32 (4th Cir.1991).

2. The PTL/Bakker Multimedia Insurance Policy

The "Multimedia Liability Policy,"[1] which listed Bakker as a named insured, covered ten torts. There is no dispute that the other nine torts were intentional torts, but the summary judgment ruling was that the tenth did not cover any intentional tort:

> negligent error, omission, misstatement or misleading statement,
> committed or alleged to have been committed in the . . . utterance or dissemination of matter published, . . . distributed, . . . broadcast, telecast, cablecast, . . . or advertised during the policy period by or with the permission of the Insured. [Policy § I(a)(7) (A.2).]

The Lifetime Partner Class' judgment for $129,000,000 was based on Jim Bakker's "misstatement or misleading statement" by television broadcasts and mailed advertisements about Lifetime Partnerships. Broadcasts and mailed advertisements came within the coverage language that embraced such misstatements or misleading statements "committed or alleged to have been committed in the . . . utterance or dissemination of matter published, . . . distributed, . . . broadcast, . . . or advertised during the policy period by or with the permission of the Insured." (A.2.)

3. Intrinsic Evidence about the Multimedia Policy's Meaning

Critical features of the Multimedia Policy itself show that it covers the Lifetime Partner Class's judgment against Bakker:

> "Misstatement or misleading statement" was policy language that must mean something other than mere types of "negligent error" in order to "give significance to each word" and to avoid rendering the phrase superfluous.

> The proposed version of the policy (Broadcasters Broad Form) had a clear negligence restriction and fraud exclusion, which were deleted in the Multimedia Policy for a 50% premi-

[1] "Multimedia" referred to coverage of not just broadcasting but publication and advertising.

um increase (*Compare* A.1 with A.436.)

> The Multimedia Policy contained other clauses where the first adjective only modified the next noun and not the string of nouns. (A.3-4.)

> The policy's crime exclusion was retained when its civil fraud exclusion was deleted. (A.3.)

> The policy's coverage of punitive damages meant coverage of the intentional torts generating such damages including civil fraud. (A.417, A.384, A.424, A.418.)

> The policy's other coverages were all intentional torts, most of which could occur by fraudulent misstatements or fraudulent misleading statements, which would make it odd to limit the separate "misstatement or misleading statement" category to negligence only. (A.2.)

Moreover, admissions were made by ERC agents:

> The coverage of negligent or non-negligent "misstatement or misleading statement" was admitted by two ERC agents. (A.056-57, 068.)

> The ambiguity of the policy language was admitted by an ERC underwriter, an ERC agent, and an ERC attorney. (A.163, 168, 165; A.143-45; A.306.)

> The possible coverage of the Teague class action was acknowledged by ERC's agent, Marsh & McLennan, and by PTL. (A.1051, 1053.)

4. Extrinsic Evidence about the Multimedia Policy's Meaning

All the extrinsic evidence was in other *ERC documents* (not merely in third party documents), and all of it involved the admissible categories of the circumstances of entering the policy and ERC's own practices:

> Alternative policy language, which was initially present then deleted here, was used in every other ERC policy cover-

ing "misstatement and misleading statement" to limit that coverage clearly to negligence ("misstatement and misleading statement *arising out of* negligent error or omission"). (A.327, 337, 348.)

> An express fraud exclusion, which also was deleted here, was used in every other ERC policy covering "misstatement or misleading statement" and in every other ERC policy covering "negligent error or omission," to limit that coverage clearly to negligence. (A.327, 337, 348; A.331-32, 336, 427, 430A, 339, 340, 341, 343, 344, 346, 416.)

> The policy offered the "expanded coverages the broadcaster needs in today's marketplace," according to ERC's flyer that was sent to PTL and Bakker just before they bought the policy, and ERC internally agreed to offer its broadest coverage, in light of what ERC called the unusually "sizable premium." (A.413, 1045-46.)

> The policy covered all types of "misstatements and misleading statements," without any negligence restriction, and included "broader coverages," according to the description of the Multimedia Policy in ERC's brochure: "Options now available include coverage of newsgathering activities, misstatements, misleading statements and personal injury." (A.325.)

Presumably, ERC's documents meant what they said, having been written by the swarms of lawyers working for that multibillion dollar subsidiary of General Electric.

All that ERC had to do in 1982 to withdraw coverage of fraudulent misstatement and misleading statement was *to say it unambiguously* in any number of ways:

To use its normal phrase (which it deleted) "misstatement or misleading statement as a result of negligent error", *or*

To add its usual exclusion (which it deleted) of "any dishon-

est, fraudulent or criminal act", *or*

To say "negligent error, negligent omission, negligent misstatement or negligent misleading statement".

ERC chose not to use any of those negligence limitations, and instead deleted the clear negligence language and the clear fraud exclusion in exchange for the 50% increase in the premium.

REASONS FOR GRANTING THE WRIT

I. IN CRITICAL ASPECTS OF SUMMARY JUDGMENT LEFT UNRESOLVED BY THIS COURT IN CELOTEX, MATSUSHITA, AND ANDERSON, THE COURT BELOW CONFLICTED WITH OTHER CIRCUITS IN SUSTAINING SUMMARY JUDGMENT AGAINST THE PTL LIFETIME PARTNER CLASS

This case raises important questions not resolved in this Court's trilogy of summary judgment decisions in *Celotex*,[2] *Matsushita*,[3] and *Anderson*[4] in 1986, and also raises important questions that were resolved in those cases but are not uniformly followed by the appellate courts: (A) whether the moving party has a different burden on summary judgment depending on whether it has the burden of persuasion on the issue at trial, (B) whether the courts may weigh the evidence to predict the preponderance at trial and to summarily judge against the predicted loser, and (C) whether the nonmoving party may meet its burden by producing evidence that may not be admissible at trial. These questions are related to the issues that closely divided this Court in the trilogy of 1986 decisions, and that commentators

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[2]Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[3]Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[4]Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

have said were inconsistently resolved in those decisions.

A. CONTRARY TO THE DISTINCTION IN CELOTEX BETWEEN THE SUMMARY JUDGMENT STANDARD WHERE THE MOVING PARTY LACKS OR HAS THE BURDEN OF PERSUASION AT TRIAL, THE COURT BELOW ERRONEOUSLY IMPOSED ON THE NONMOVING PARTY THE BURDEN IT WOULD HAVE IF IT HAD THE BURDEN OF PERSUASION AT TRIAL, FOLLOWING INCONSISTENT DICTA IN MATSUSHITA THAT HAS BECOME A POINT OF CONFUSION IN OTHER CIRCUITS

1. Division on Summary Judgment Burden Varying with Trial Burden

Celotex, as *Anderson*, involved a motion for summary judgment by the party who *did not* have the burden of persuasion on the issue at trial. Such a party indeed *does not* have the burden of establishing the absence of genuine issues of material fact. However, this case involves a motion for summary judgment by the party who *does* have the burden of persuasion at trial, and such a party *does* have the burden of establishing the absence of genuine issues of material fact. The majority made that distinction in clear terms:

> Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, *and on which that party will bear the burden of proof at trial*. . . .

477 U.S. at 322. The dissent by Justice Brennan, Chief Justice Burger, and Justice Blackmun made the same distinction (Justice Stevens dissented separately):

> The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is entitled to summary judgment. 10A Wright § 2727. The manner in which this showing can be made *depends upon which party will bear the burden of persuasion on the challenged claim at trial.* [1] If the *moving party will bear the burden of persuasion at trial*, that party *must support its motion with credible evidence*--using any of the materi-

> als specified in Rule 56(c)--that would entitle it to a directed verdict if not controverted at trial. Ibid. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial . . . .
>
> [2] If the *burden of persuasion at trial would be on the nonmoving party*, the party moving for summary judgment may satisfy Rule 56's burden of production in either of two ways. First the moving party may submit affirmative evidence that negates an essential element of the nonmoving party's claim. Second, the moving party may demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. See 10A Wright § 2727, pp. 130-131; Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 Yale L.J. 745, 750 (1974) . . . .
>
> . . . .
>
> . . . Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 323. . . . [T]he moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.
>
> . . . .
>
> I do not read the Court's opinion to say anything inconsistent with or different from the preceding discussion....

Celotex Corp. v. Catrett, 477 U.S. at 331-34.

Similarly, *Anderson* involved a motion for summary judgment by the party that *did not* have the burden of persuasion, and stated the rule the same way. 477 U.S. at 256.

Matsushita, by contrast, involved a motion for summary judgment by the party who *did* have the burden of persuasion on the issue at trial, and was decided three months before *Celotex*. The Court did not make the foregoing distinction, stating the burden of the *nonmoving* party to "establish that there is a genuine issue of material fact," but stating that the burden of the *moving* party in its motion or in its reply "is not before us." 475 U.S. at 585 n.10.

2. Erroneous Burden in This Case

ERC had the burden of persuasion at trial on noncoverage, both because it was the plaintiff and because settled presumptions were required in favor of the insureds.[5] The insureds here produced the intrinsic evidence summarized at pages 3-4 *supra* as well as the extrinsic evidence that should have been considered in determining whether there is ambiguity (pages 21-25 *infra*).

The court below did not require ERC to meet its burden on summary judgment (to "demonstrate that there is *no* evidence in the record to support a judgment for the nonmoving party"). Instead, the court below effectively extended the *Celotex* rule for moving parties *without* the burden of persuasion to apply to motions by parties *with* that burden. (The only showing made by ERC was to produce its complaint and the insurance policy.) The court below effectively extended *Celotex*, *Anderson*, and *Matsushita* to nonmoving parties (the Lifetime Partner Class) who do not have the burden of persuasion at trial, and placed no burden on the moving party (ERC, with the burden of persuasion at trial) except that it flatly allege that there were no genuine issues of material fact. After the Lifetime Partner Class responded, the court below did not place any burden whatsoever on ERC, even to respond to affidavits and intrinsic evidence.

The decision of the court below therefore conflicts with deci-

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[5] *E.g.*, 13 *Appleman's Insurance Law and Practice* § 7401, at 197 et seq. ("almost the unanimous holding of all courts that insurance contracts must be liberally construed in favor of a policyholder or beneficiary"); Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 322 (1928) (same); North Carolina Farm Bureau Mutual Insurance Co. v. Stox, 412 S.E.2d 318, 325-26 (N.C. 1992) (undefined term is construed for coverage); Jamestown Mutual Ins. Co. v. Nationwide Mutual Ins. Co., 266 N.C. 430, 146 S.E.2d 410, 416 (1966) (refusing insurer's slippery words and allowing coverage by broad words).

sions from other circuits. *See Resolution Trust Corp. v. Gill*, 960 F.2d 336, 340 (3d Cir. 1992); *Anchorage Associates v. Virgin Islands Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990); *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264-65 (5th Cir. 1991); *Bruning v. Pixler*, 949 F.2d 352, 356-57 (10th Cir. 1991); *Chanel, Inc. v. Italian Activewear, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991).

B. CONTRARY TO THIS COURT'S HOLDING IN ANDERSON THAT "THE JUDGE'S FUNCTION IS NOT HIMSELF TO WEIGH THE EVIDENCE," THE COURT BELOW WEIGHED THE EVIDENCE AND THEREBY CONCLUDED THAT EMPLOYERS REINSURANCE WOULD WIN AT TRIAL AND SHOULD WIN ON SUMMARY JUDGMENT, FOLLOWING INCONSISTENT LANGUAGE IN ANDERSON AND MATSUSHITA, WHICH HAS BECOME A POINT OF CONFUSION IN THE CIRCUITS

The Lifetime Partner Class, as the nonmoving party, proved the existence of genuine issues of material fact by the nonexcluded evidence as well as by the wrongly excluded evidence. However, the court below did not stop by finding the Rule 56 requirement met by a showing of genuine issues of material fact, but proceeded to weigh that evidence and predict the weight that would be found at trial. *See* slip op. at 5-6.

1. Division on Weighing Evidence

Rule 56(c) allows summary judgment only when "there is *no* genuine issue as to *any* material fact." It does not authorize weighing of the evidence. This is why, rather than weighing, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita*, 475 U.S. at 587, quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). This is also why "material" facts are "disputes over facts that *might* affect the outcome of the suit under the governing law," not those that

do affect the outcome. *Anderson*, 477 U.S. at 248.

Anderson expressly barred any weighing of evidence:

> [I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is *not himself to weigh the evidence and determine the truth of the matter* but to determine whether there is a genuine issue for trial. . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . .
>
> . . . .
>
> If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. . . .

477 U.S. at 249-50.[6] In determining materiality, the Court further said that "[a]ny proof or evidentiary requirements imposed by the substantive law are not germane to this inquiry ...." *Id.* at 248. Yet the dissents found other language in the majority opinion troubling because it seemed to suggest some weighing:

> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quality" to meet that "quantum." I would have thought that a determination of the "caliber and quality," i.e., the importance and value, of the evidence in light of the "quantum," i.e., amount required could *only* be performed by weighing the evidence. . . .
>
> . . . [I]f the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

Id. at 266-67 (Brennan, J., dissenting). *See also id.* at 272 (Rehnquist, J., dissenting with Burger, C.J.).

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[6]Similarly, *Celotex* did not require or allow weighing of evidence, but simply sustained summary judgment if there were "a *complete* failure of proof concerning an essential element of the nonmoving party's case," and if the Insurer "demonstrate[d] . . . that the claims and defenses have *no* factual basis." 477 U.S. at 323, 327 (majority opinion). *Accord, id.* at 328 (White, J., concurring), 332 (Brennan, J., dissenting, with Burger, C.J., and Blackman J.)

However, *Matsushita* seems to authorize weighing of evidence by saying that the showing of a "genuine" issue must be "more than simply showing that there is some metaphysical doubt as to the material facts," that "if the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary," and that the "expert study" relied on by the nonmovant "has little probative value." 475 U.S. at 586-87, 594 n.19. The dissent objected on precisely that ground:

> Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the *weight of the evidence* favors the plaintiff. Cities Service and Montsanto do not stand for any such proposition. . . .

Id. at 600 (White, J., dissenting, with Brennan, Blackmun, and Stevens, JJ.). As in this case, the lower court simply "ignores the contrary conclusions of respondents' expert DePodwin, whose report in very relevant part was erroneously excluded by the District Court," and which "Report [affidavit] alone creates a genuine factual issue" that should have prevented summary judgment. *Id.* at 601, 603. The lower courts in this case apparently read *Matsushita* to allow weighing of evidence on summary judgment.

The circuits are in disarray on this issue. Most circuits agree that evidence should not be weighed on summary judgment. *E.g., City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir. 1992); *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992); *Lang v. Retirement Living Publishing Co., Inc.*, 949 F.2d 576, 580 (2d Cir. 1991); *Ryder Int'l Corp. v. First American Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991); *Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc.*, 922 F.2d 220, 223 (5th Cir. 1991); *Perez v.*

Curcio, 841 F.2d 255, 258 (9th Cir. 1988); *Wilson v. Myers*, 823 F.2d 253, 256 (8th Cir. 1987). Some circuits explicitly or implicitly endorse weighing of evidence. *E.g., Mesnick v. General Elec. Co.*, 950 F.2d 816, 825 (1st Cir. 1991); *Country Floors, Inc. v. Partnership*, 930 F.2d 1056, 1061-62 (3d Cir. 1991); *Pyramid Securities Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1116 (D.C. Cir. 1991); *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568, 1573 (7th Cir. 1989).

2. Erroneous Weighing of Evidence in This Case

Employers Reinsurance did not foreclose any of the facts and inferences that the Lifetime Partner Class raised, and that were to be considered in the light most favorable to the Lifetime Partner class. Instead, Employers Reinsurance relied on excluding as many of the affidavits as possible, and on weighing the rest of the forecast evidence.

The courts below effectively weighed the evidence that remained, after improperly excluding the affidavits at the summary judgment stage. As the appellate court said, "we consider first whether the language in question is ambiguous and then whether that language, on its own and in the context of the policy, includes coverage for fraudulent misstatements." Slip op. at 4. In doing so, the court discounted the intrinsic evidence offered by the PTL Lifetime Partner Class, or in some cases incorrectly categorized it as extrinsic, while refusing to consider the extrinsic evidence even to show the existence of ambiguity, and the circumstances of entering the policy, and ERC's and industry practices (as all contract and insurance treatises, and all relevant North Carolina cases, require as discussed in 21-25 and 27-30 *infra*).

Thus, the court below weighed and found wanting (or ignored) all the *intrinsic evidence* (with no light favoring the nonmoving party or the insured), which was summarized at 3-4 *supra*.

The court below *miscategorized some of that intrinsic evidence* as extrinsic, and refused to consider it, such as the most critical piece of evidence (the replacement of the proposed version of the policy that had a clear negligence restriction and fraud exclusion, with the final version of the Multimedia Policy that lacked either, for a 50% premium increase, slip op. at 5[7]), and all the deposition admissions of ERC agents. The court also *excluded the affidavits of insurance experts*, despite the clear admissibility of industry practice (29-30 *supra*). And the court below erroneously refused to consider any *extrinsic evidence* to identify latent ambiguity, to learn circumstances of entering the policy, or ERC and industry practice (4-5 *supra*).

The lower court's approach failed to follow the admonition that "Rule 56 must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury . . . ." *Celotex Corp. v. Catrett*, 477 U.S. at 327.

C. CONTRARY TO THIS COURT'S REJECTION IN CELOTEX OF THE ARGUMENT THAT "THE NONMOVING PARTY MUST PRODUCE EVIDENCE IN A FORM THAT WOULD BE ADMISSIBLE AT TRIAL," THE COURT BELOW EXCLUDED AND IGNORED EVIDENCE THAT IT FOUND INADMISSIBLE (MISTAKENLY), AND THEREBY EXCLUDED AND IGNORED AFFIDAVITS OF EXPERTS AND AFFIDAVITS OFFERING INSURER DOCUMENTS THAT DEMONSTRATE GENUINE ISSUES OF MATERIAL FACT, FOLLOWING INCONSISTENT LANGUAGE IN ANDERSON AND MATSUSHITA, WHICH HAS BECOME A POINT OF CONFUSION IN THE CIRCUITS

The court below also erred in ignoring evidence at the summary

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[7]The proposed version of the policy was wrongly excluded by the district court as untimely filed, along with the Marsh & McLennan memorandum, even though they were wrongfully withheld by ERC, but the appellate court did not rely on that exclusion. We challenge that exclusion.

judgment level that it found inadmissible, even though it forecast admissible testimony. (That evidence was in fact admissible, 21-).

Celotex expressly recognized that evidence could meet Rule 56 requirements even though it was inadmissible at trial:

> We do *not mean that the nonmoving party must produce evidence in a form that would be admissible at trial* in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves . . . .

477 U.S. at 324. *Accord,* 477 U.S. at 333 (Brennan, J., dissenting, with Burger, C.J. and Blackmun, J.).

However, in *Matsushita*, the Court seemed to approve the lower courts' exclusions of evidence that apparently fell within the response devices expressly listed in Rule 56. While the Court expressly excluded "[t]hese evidentiary rulings" from the grant of certiorari, 475 U.S. at 580, it noted without criticism that "the District Court found the bulk of the evidence on which Zenith and NUE relied inadmissible," and that the "Court of Appeals . . . began by examining the District Court's evidentiary rulings, and determined that much [but not all] of the evidence excluded by the District Court was in fact *admissible*." *Id.*

The Lifetime Partners' response to ERC's summary judgment motion consisted of five affidavits by expert witnesses, seven depositions by ERC officials and agents, and two affidavits offering ERC documents. These materials conformed precisely to the response devices expressly in Rule 56, and were excluded. They actually were admissible as showing industry practice and as admissions.

II. THE PANEL DECISION CONFLICTED WITH DECISIONS OF THIS CIRCUIT AND THE SUPREME COURT, AND OVERLOOKED MATERIAL NORTH CAROLINA LAW, REQUIRING POLICY CONSTRUCTION TO GIVE

SIGNIFICANCE TO EACH WORD, NECESSITATING EXTRINSIC EVIDENCE TO DETERMINE IF LATENT AMBIGUITY EXISTS, AND ALLOWING EXTRINSIC EVIDENCE TO SHOW CIRCUMSTANCES OF ENTERING THE POLICY AND INSURER PRACTICE

A. "SIGNIFICANCE MUST BE GIVEN TO EACH WORD" IN AN INSURANCE POLICY, AND FOLLOWING THAT RULE SHOWS THAT THE DISPUTED LANGUAGE COVERS NON-NEGLIGENT "MISSTATEMENT OR MISLEADING STATEMENT" OR IS AMBIGUOUS

1. Uniform Decisions Require "Giving Significance to Each Word"

The general rule, stated by this Court, as well as treatises[8] and North Carolina courts,[9] is that each policy clause must be given "independent significance":

> [I]t is not intended to render meaningless the general words. Therefore, *where the particular words exhaust the class, the general words must be construed as embracing something outside of that class.* If the particular words exhaust the genus, . . . we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and there by sacrifice the general to preserve the particular words.

United States v. Mescall, 215 U.S. 26, 31-32 (1909). Thus, the "particular words" "negligent error" exhaust the class of negligent misstatements and negligent misleading statement, and so

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[8] 13 *Appleman's Insurance Law and Practice* § 7386, at 37 (Supp. 1991) ("But a contract should be interpreted to give significance to each word or phrase according to its importance in the context of the contract and when the specific words exhaust the class described, general words which follow should be construed to embrace something outside the class."); *e.g.*, M.B.A.F.B. Federal Credit Union v. Cumis Ins. Society, 681 F.2d 930, 932 (4th Cir. 1982).

[9] *E.g.*, Silvers v. Horace Mann Ins. Co., 324 N.C. 289, 378 S.E.2d 21, 25 (1989) ("every word and every provision is to be given effect"); Williams v. Nationwide Mutual Ins. Co., 269 N.C. 235, 152 S.E.2d 102, 107 (1967) (same).

the "general words" "misstatement and misleading statement" similarly "must be construed as embracing something outside of that class" of "negligent error." To do otherwise "renders meaningless" those general words, something that North Carolina law[10] and insurance treatises[11] clearly forbid.

2. Failure "To Give Significance to Each Word" Rendered Meaningless the Words "Misstatement or Misleading Statement" by Limiting Them to Types of "Negligent" Error, and "Giving Significance to Each Word" Proves Coverage or at Least Ambiguity

The panel conflicted with that rule by failing to give independent significance to the words covering "misstatement or misleading statement." In this policy, the coverage of "negligent error" necessarily includes negligent misstatements and negligent misleading statements. ERC admitted that by using the language "misstatement or misleading statement as a result of negligent error or omission" in the rejected draft of this policy. (A.435-36.) Thus, only by understanding "negligent" to modify "error" alone can any independent significance be given to the words "misstatement and misleading statement" in the coverage language. When the panel understood "negligent" to modify "misstatement or misleading statement," it failed to give independent significance to the phrase and rendered it meaningless.

ERC effectively acknowledged this when it eliminated the clear negligence language and deleted the clear fraud exclusion in exchange for a 50% premium increase. (*Compare* A.436 with A.1, 435.) ERC also acknowledged this interpretation when it could

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[10] *E.g.*, Silvers v. Horace Mann Ins. Co., 324 N.C. 289, 378 S.E.2d 21, 25 (1989) ("every word and every provision is to be given effect"); Williams v. Nationwide Mutual Ins. Co., 269 N.C. 235, 152 S.E.2d 102, 107 (1967) (same).

[11] *E.g.*, 13 *Appleman's Insurance Law and Practice* § 7386, at 37 (Supp. 1991); M.B.F.A.B. Federal Credit Union v. Cumis Ins. Society, 681 F.2d 930, 932 (4th Cir. 1982).

give no reason, under its interpretation, why it needed a criminal exclusion in this policy, or a fraud exclusion in the proposed version, in every other "misstatement and misleading statement" policy, and in every other "negligent error or omission" policy.[12] If "negligent" modified "misstatement or misleading statement," there was no need to exclude "crimes" here or "fraud" there.

3. The Reading of "Misstatement or Misleading Statement" To Include Non-Negligent Statements Is Consistent with the Other Internal Evidence in the Policy

Other language in the policy supports the reading of the policy resulting from giving "misstatement or misleading statement" independent significance. The panel overlooked this language and other important facts in concluding that "there is no dispute regarding the facts." (Slip op. at 4.) These disputed facts include the following five lines of internal evidence, besides the expert affidavits and ERC admissions and five lines of extrinsic evidence (21-30), and all show coverage or at least ambiguity. In fact, every policy-related document and affidavit in the record supports the Lifetime Partners' reading of the policy, and opposes ERC's.

a. The Deletion of the Clear Negligence Language and of the Clear Fraud Exclusion, in Exchange for Increasing the Premium 50%, Shows that "Negligent" Only Modifies "Error" and Not "Misstatement or Misleading Statement"

The proposed version of the policy (the Broadcasters Broad Form Policy) had a clear negligence restriction and clear fraud exclusion, and *those provisions were deleted* in the final policy (the Multimedia Policy) after a 50% increase in the premium. (A.1047, A.2-3.) In other words, the Multimedia Liability Policy made exactly the two changes that would be expected if its coverage was meant to extend beyond negligence to fraud:

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[12] *E.g.*, A.269-71, 198-200, 225, 289, 293, 315-16.

Broadcasters Broad Form	*Final Multimedia Policy*
Coverage: "misstatement or misleading statement as a result of negligent error or omission"	**Coverage:** "negligent error, omission, misstatement or misleading statement"
Exclusion: "any judicially determined dishonest, fraudulent or criminal act"	**Exclusion:** "criminal fines or penalties"

As Appleman states, "the fact that the insurer had available common alternative usages of limited coverage clauses and an exclusionary clause, where only one alternative was employed, is a clearly permissible aid to construction."[13]

The *premium was increased by 50%* when the Broadcaster's Broad Form was changed to the Multimedia Policy. (A.436 ($28,125), A.1 ($42,187).) The "necessary inference" from the "substantial additional premium" is "that the parties intended that the policy, as amended, would provide substantial additional protection." *York Industrial Center, Inc. v. Michigan Mutual Liability Co.*, 271 N.C. 158, 155 S.E.2d 501, 505 (1967). By contrast, every court decision that the panel cited or referred to (from ERC's brief), involving a "negligent error or omission" policy, had an *express fraud exclusion*.[14]

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[13]13 *Appleman's Insurance Law and Practice* § 7387, at 179. *E.g.*, Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 172 S.E.2d 518, 525 (1970) (later-used "'standard provision' of such policies" allowed, in case relied on by ERC); West American Ins. Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 699 (N.C.App. 1991) ("the insurance industry amended the pollution exclusion clause"); Calvert Fire Insurance Co. v. Yosemite Insurance Co., 573 F.Supp. 27, 29, 30 n.2 (E.D.N.C. 1983) (other policy of same insurer, as extrinsic evidence exception).

[14]*E.g.*, United States Fidelity & Guaranty Co. v. Fireman's Fund Insurance Co., 896 F. 200, 201 (6th Cir. 1990) (any "dishonest, fraudulent, or malicious act"); Golf Course Sup'ts Ass'n v. Underwriters at Lloyd's, 761 F.Supp. 1485, 1490 (D.Kan. 1991) ("policy expressly excludes coverage . . . dishonesty").

[15]Reply Br. of Appellants at 4-11, Teague v. Employers Reinsurance Corp., No. 91-2299 (4th Cir. filed Nov. 18, 1991).

b. The Other Clauses in the Multimedia Policy Where the First Adjective Only Modified the Next Noun and Not the String of Nouns Show that "Negligent" Only Modifies "Error" and Not "Misstatement or Misleading Statement"

The panel was mistaken in ruling "that the adjective preceding a series of nouns [necessarily] modifies every noun in the series," and in finding its construction to be "in accordance with grammatical rules and popular usage." (Slip op. at 5, 4.) First, the *policy itself has a pattern* of adjectives that only modify the next noun and not the rest of the series, such as the following:

> "court costs, interest upon judgments, investigation, adjustment, and legal expenses paid by the Insured" [IV(b)]
> "under any workmen's compensation, unemployment compensation or disability benefits law, or under any similar law" [II(a)(4)]
> "prejudgment interest and plaintiff's costs included in the judgment" [IV(b)]

Second, the only "grammatical rules" that ERC was able to show was an arcane inapplicable rule in one grammar book. *No such grammatical rule* was given in the fifteen grammar books that the Lifetime Partner Class cited, or in any ERC manual or insurance industry document, and the rule had been cited by only one court in American history (in 1934).[15] Third, ERC's general counsel and claims director *denied that ERC was relying on any rules of interpretation* in denying coverage. (A.191, 287.)

c. The Use of a Crime Exclusion, and Deletion of a Civil Fraud Exclusion, Support Coverage of Civilly Fraudulent "Misstatement and Misleading Statement"

ERC's selection of a criminal exclusion but not a fraud exclusion plainly means that ERC chose to exclude crimes but not civil fraud. Because even the clear negligence language of other policies required an express fraud exclusion to avoid coverage of fraudulent "misstatement or misleading statement," the unrestricted (or at best ambiguous) coverage language of the Multimedia Lia-

bility Policy required an express fraud exclusion to avoid coverage of fraudulent "misstatement or misleading statement." ERC "could have expressed in plain words the exception for which it now contends," as in a case of this Court involving the insurer's failure to exclude "anything relative to fraud." *Stroehmann v. Mutual Life Ins. Co.*, 300 U.S. 435, 438-39 (1937).

d. The Coverage of Punitive Damages, Which Result Only from Fraudulent Statements and Not from Negligent Ones, Shows Coverage of Civilly Fraudulent "Misstatement and Misleading Statement"

There is no question that the Multimedia Liability Policy covered punitive damages in North Carolina. (A.417, 424, 418.) Coverage of punitive damages, without an express exclusion, entails coverage of the grounds for punitive damages, including civil fraud.

e. The Coverage of Every Other Intentional and Fraudulent Tort, and of Every Included Type of Fraudulent Statement, Shows Coverage of Fraudulent "Misstatement and Misleading Statement"

The context of the "misstatement or misleading statement" language was that the policy covered virtually every other intentional tort against property, and every other such tort could be committed by fraudulent "misstatement or misleading statement." The policy had a very leaky stopper if all "misstatements or misleading statements" were included in coverages (1)-(6) and (8)-(10), but only "negligent" ones were included in coverage (7).

B. EXTRINSIC EVIDENCE MUST BE CONSIDERED TO DECIDE WHETHER THERE IS LATENT AMBIGUITY

1. Uniform Authority Allows Extrinsic Evidence To Show Latent Ambiguity, and Recognizes that It Is Indispensable

Until the decision under appeal, all circuits agreed that extrinsic evidence can and must be used to *identify* latent ambiguities, and extrinsic evidence may and must be considered before a finding of latent ambiguity can be made, so the extrinsic evi-

dence rule is not the same for latent ambiguity as for patent ambiguity.[16] In rare unanimity, the treatises agreed as well that "[e]ven though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed".[17]

§ 79:143. Explanation of ambiguities.

A *latent ambiguity* exists where, on the face of a policy, there is no doubt or uncertainty, but *by proof aliun-*

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[16]*E.g.*, United States ex rel. West Chester Electric v. Sentry Ins., 774 F.2d 80, 84 (4th Cir. 1985) ("An ambiguity arises when the payment bond is considered together with the subcontract."); Sherman v. Mutual Benefit Life Ins. Co., 633 F.2d 782, 784 (9th Cir. 1980) (latent ambiguity may be shown by extrinsic evidence, even if the policy "appears to the court to be plain and unambiguous"); Pan Am World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989 (2d Cir. 1974) (ambiguity shown by extrinsic evidence of insurer's adoption of new clauses to deal with similar losses, showing that prior exclusions were ambiguous); University City v. Home Fire & Marine Ins. Co., 114 F.2d 288, 295 (8th Cir. 1940) ("a latent ambiguity is one developed by extrinsic evidence"); Queen Ins. Co. v. Meyer Milling Co., 43 F.2d 885, 887 (8th Cir. 1930) ("To discover latent ambiguity it is, of course, necessary to go outside the instrument"); St. Paul Fire & Marine Ins. Co. v. Balfour, 168 F. 212, 216 (9th Cir. 1909) ("a latent ambiguity . . . raised by the parol evidence"); Kuhn v. Chesapeake & O.Ry., 118 F.2d 400, 404 (4th Cir. 1941) (apparently unambiguous deed placing border at the river shown latently ambiguous by extrinsic evidence that the river split around an island; that "latent ambiguity" is "resolved by the jury in the light of the parol evidence"); Pacific Gas & Electric Co. v. G.W.Thomas Drayage & Rigging Co., 69 Cal.2d 33, 37, 442 P.2d 641, 644 (1968) (per Chief Justice Traynor) ("The test . . . is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.").

[17]2 *Restatement of Contracts 2d* § 214 Comment b (1981). *E.g.*, 2 *Restatement of Contracts 2d* §§ 213 (parol evidence excluded only if inconsistent), 212 & Comment b (extrinsic evidence generally admissible) (1981); 3 *Corbin on Contracts* § 542, at 108-10 (1960); 30 Am.Jur.2d *Evidence* § 1073, at 218 (latent ambiguity "is shown to exist for the first time by matter outside the writing").

> *de the language is shown* to be alike applicable to two or more persons or objects.
>
> **Parol evidence is admissible to explain a latent ambiguity** but not to explain a patent ambiguity, which is one arising upon the face of the instrument . . . .
>
> Where either the general language or particular words or phrases used in a contract of insurance are ambiguous, that is doubtful as to meaning, or, *in the light of other facts*, reasonably capable of having more than one meaning so that the one applicable to the contract in question cannot be ascertained without outside aid, *extrinsic evidence may be introduced to explain such ambiguity.*
>
> Evidence of actual intent is admissible if *a latent defect is disclosed by the surrounding circumstances*, even in the absence of a patent ambiguity.[18]

North Carolina courts, without a single exception, joined in this unanimous authority that "[a] *latent ambiguity* may arise where the words of a written agreement are plain, but by reason of *extraneous facts* the definite and certain application of those words is found impracticable."[19] "A patent ambiguity cannot be explained by parol, a latent ambiguity can."[20]

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[18]*Couch Cyclopedia of Insurance Law* §§ 79:141-47, at 116-20, 124.

[19]Miller v. Green, 183 N.C. 652, 112 S.E. 417, 418 (1922). *E.g.*, Calvert Fire Insurance Co. v. Yosemite Insurance Co., 573 F.Supp. 27, 29, 30 n.2 (E.D.N.C. 1983) (insurance term was determined to be "not ambiguous," by use of the extrinsic evidence of a separate insurance policy, and that use of a separate policy "where one of the parties is the same" was treated as an exception to the rule excluding such extrinsic evidence.); Redd v. Taylor, 270 N.C. 14, 153 S.E.2d 761, 766-67 (1967) (will leaving gift to "World Missions" clear on its face but shown latently ambiguous by extrinsic evidence of two groups with that name).

[20]*E.g.*, Perry v. Morgan, 219 N.C. 377, 14 S.E.2d 46, 49 (1941). *Accord*, Thompson v. Umberger, 221 N.C. 178, 19 S.E.2d 484, 485 (1942); Green v. Harshaw, 187 N.C. 213, 121 S.E. 456, 458 (1924); Maurice v. Hatterasman Motel Corp., 38 N.C.App. 588, 248 S.E.2d 430, 432 (1978); *Couch Cyclopedia of Insurance Law* §§ 79:143, 147, at 116, 124 ("Parol evidence is admissible to explain a latent ambiguity but not to explain a patent ambiguity . . . . A latent ambiguity as to coverage permits the admission of extrinsic evidence to discover the real intent of the contracting

The appellate panel fractured the uniformity of this rule in holding that "unambiguous policy language is to be construed without resort to extrinsic evidence" (slip op. at 5), even for the purpose of identifying latent ambiguity as precedent allows. The panel thereby confused patent ambiguity (for which the rule is correctly stated) with latent ambiguity (which comes under the different rule, and which could never be discovered without extrinsic evidence[21]). That exclusion removed powerful evidence that proved coverage or at least ambiguity.

Second, the law is equally uniform that *explanation* of "the meaning of [a] writing, whether or not integrated," may be assisted by extrinsic evidence, without coming under the extrinsic evidence rule so long as it does not vary the terms of the writing. 2 *Restatement of Contracts 2d* § 214(c) (1981). The other circuits[22] and treatises[23] agree. Contrary to

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parties."); 4 *Williston on Contracts* § 627, at 897; 30 Am.Jur.2d *Evidence* § 1073 (1967 & Supp. 1991); 32A C.J.S. *Evidence* § 961(b)-(d) (1964 & Supp. 1991).

[21]"Before holding that the words of a written contract are so 'plain and clear' that extrinsic evidence in aid of interpretation is not admissible, the court . . . is substituting its own linguistic education and experience for that of the contracting parties." 3 *Corbin on Contracts* § 542, at 111 (1960). "Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed." 3 *Restatement of Contracts 2d* § 214 Comment b.

[22]*E.g.*, Sherman v. Mutual Benefit Life Ins. Co., 633 F.2d 782, 785 (9th Cir. 1980) (policy dispute "'must be resolved by consideration of relevant extrinsic evidence that explains but does not flatly contradict the writing'"); Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1000 n.10 (2d Cir. 1974) (allowing "proper weight to the fact that the all risk insurers adopted new clauses"); Hartford Steam Boiler Ins. Co. v. Schwartzman Packing Co., 423 F.2d 1170, 1173 (10th Cir. 1970) ("testimony of the insurance broker who was agent for Hartford, two prior insurance policies of Hartford issued to Schwartzman, a letter from Hartford to its agents describing

this uniform rule of other circuits, the court below refused to allow extrinsic evidence to explain the meaning of the Multimedia Policy.[24]

Finally, the *modern rule is that extrinsic evidence is considered* even in the absence of latent or patent ambiguity.[25] North Carolina appears to have adopted this rule.[26]

2. The Contrary Rule Conflicts with Insurance Precedents Resolving Latent as Well as Patent Ambiguity for the Insured

The Fourth Circuit approach, refusing to consider latent ambiguity as identified by extrinsic evidence, conflicts with this Court's "settled" rule "that, in case of ambiguity, that construc-

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policy changes and a letter from Hartford to Schwartzman" constituted extrinsic "evidence [that] was relevant and admissible"); National Surety Corp. v. Musgrove, 310 F.2d 256, 260 (5th Cir. 1962) (agent testimony about meaning); Aetna Life Ins. Co. v. Phillips, 69 F.2d 901, 904 (10th Cir. 1934) ("a latent ambiguity may be explained by extrinsic evidence"); Queen Ins. Co. v. Meyer Milling Co., 43 F.2d 885, 888 (8th Cir. 1930) (latent ambiguity resolved by agent testimony showing parties' intent); Scottish Union & National Ins. Co. v. McKone, 227 F. 813, 815 (8th Cir. 1915) (same showing correct property description); St. Paul Fire & Marine Ins. Co. v. Balfour, 168 F. 212, 216 (9th Cir. 1909) ("'it is so well established as to be beyond all possible dispute that parol or other extrinsic evidence is always admissible to explain a latent ambiguity'").

[23]*E.g.*, Couch Cyclopedia of Insurance Law § 79:143, at 116-20 ("Parol evidence is admissible to explain a latent ambiguity"); 32A C.J.S. *Evidence* § 961(b), at 428 (1964 & Supp. 1991) ("It is generally held that parol or other extrinsic evidence is always admissible to explain a latent ambiguity.").

[24]*See* note *supra*.

[25]2 *Restatement of Contracts 2d* § 212, Comment b, at 126 (1981) ("not limited to cases where it is determined that the language used is ambiguous"); *id.* § 213 (parol evidence excluded only if inconsistent); 3 *Corbin on Contracts* § 542, at 108-10 (1960).

[26]West American Insurance Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 696-97 (N.C.App. 1991) (relying on extrinsic evidence but not requiring ambiguity, because ambiguity was an entirely separate "second reason" for decision, *id.* at 697).

tion of the policy will be adopted which is *most favorable to the insured*," even if not "free from reasonable doubt."[27] The extrinsic evidence rule would exclude the evidence when it is useful (before latent ambiguity is found), and would admit extrinsic evidence only when it is useless (once ambiguity is found, and the ambiguity is automatically resolved in the insured's favor).

3. The Extrinsic Evidence Did Show and Explain Latent Ambiguity and the ERC Admissions Were Not Extrinsic At All

Latent ambiguity was *shown* by all of the extrinsic evidence that the Fourth Circuit refused to consider (4-5 *supra*), such as ERC's alternative policy language (initially present then deleted here) that ERC deemed necessary to limit to negligence every other of its policies covering "misstatement and misleading statement," and ERC's express fraud exclusion (also initially present and then deleted here) that ERC similarly deemed necessary.[28]

Further, ERC's *admissions were not extrinsic evidence* at all, but certainly showed latent ambiguity, and at a minimum create a genuine issue of material fact. Two agents admitted that the disputed language covers negligent or non-negligent "misstatement or misleading statement" (A.056-57, 068), two ERC officials and an agent admitted the possible ambiguity of the policy language (A.163, 168, 165; A.143-45; A.306), and one agent even admitted the possible coverage of the Teague class action (A.1051,

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[27]Mutual Life Ins. Co. v. Hurni Packing Co., 263 U.S. 167, 174-75 (1923). *Accord*, Continental Casualty Co. v. Burton, 795 F.2d 1187, 1190 (4th Cir. 1986); C.Douglas Wilson & Co. v. INA, 590 F.2d 1275, 1288 (4th Cir. 1979).

[28]Stroehmann v. Mutual Life Ins. Co., 300 U.S. 435, 438-39 (1937) (case involving the insurer's failure to exclude "anything relative to fraud"). *Accord*, Equitable Life Assurance Society v. Deem, 91 F.2d 569, 574 (4th Cir. 1937) ("If it had been the intention . . . it would have been easy enough to use language making that intention clear").

1053). Those agents' admissions are ERC's admissions,[29] because "[e]very agent . . . is regarded as representing the insurer and not the insured". N.C.G.S. § 58-33-20(a).[30] Agents' admissions are binding without regard to rules governing extrinsic evidence.[31] If there were any dispute whether these were ERC's agents, that itself would be a factual issue.[32]

C. EXTRINSIC EVIDENCE MAY BE USED TO SHOW THE CIRCUMSTANCES OF ENTERING THE POLICY, ERC'S PRACTICES, AND INDUSTRY PRACTICES, WITHOUT ANY FINDING OF AMBIGUITY

1. Circumstances of Entering the Policy May Be Considered without Any Ambiguity

First, the extrinsic evidence rule does not apply to the circumstances of entering the policy, as this Court has recognized:

> There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court . . . may also consider . . . the circumstances under which it was signed."[33]

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[29] *E.g.*, 44 Am.Jur.2d *Insurance* § 1969, at 973 (1982) (agents' admissions generally) (citing cases); 19 *Couch on Insurance* § 79:197, at 167 (same).

[30] *Accord*, Stipcich v. Metropolitan Life Ins. Co., 277 U.S. 311, 320-21 (1928); 3 *Couch Cyclopedia of Insurance Law* § 26.1, at 488. "It is well settled in this state that the knowledge of the local agent of an insurance company is in law the knowledge of the principal," and this is true "though the policy contains a stipulation to the contrary." Williams v. Greensboro Fire Ins. Co., 289 N.C. 765, 185 S.E. 21, 23 (1936). *Accord*, Commercial Casualty Ins. Co. v. Lawhead, 62 F.2d 929, 930 (4th Cir. 1933), *cert. denied*, 289 U.S. 731 (1934).

[31] *E.g.*, Fox v. Volunteer State Life Ins. Co., 186 N.C. 761, 119 S.E. 172, 172 (1923); King v. Travelers Inc. Co., 84 N.M. 550, 505 P.2d 1226 (1973); *see* Orren v. Phoenix Ins. Co., 288 Minn. 225, 179 N.W.2d 166, 169 (1970); U.S.Fidelity & Guaranty Co. v. Baugh, 257 N.E.2d 699, 712-13 (Ind. App. 1970).

[32] 22 *Appleman's Insurance Law and Practice* § 12854, at 26-28. *Accord*, Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979).

[33] Chicago, Rock Island & P.R. v. Denver & Rio Grande R.,

The treatises, such as the *Restatement*, agree:[34]

> *Plain meaning and extrinsic evidence.* It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) [considering circumstances] is *not limited to cases where it is determined that the language used is ambiguous*. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation . . ., preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. . . .[35]

North Carolina law concurs without exception.[36]

The principle extends to the insurer's own practices, under this Court's decisions and insurance treatises[37] and North

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143 U.S. 596, 609 (1892).

[34]*Couch Cyclopedia of Insurance Law* § 79:143 ("§ 79:142. Custom and course of dealings. Evidence of previous dealings with the insured, and the insurer's general manner of doing business through agents, is admissible . . . . Usage may be proved by parol . . . ."); 2 *Restatement of Contracts 2d* § 214(c) (1981) ("Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . the meaning of the writing, whether or not integrated."); 4 *Williston on Contract* § 629, at 918-19 (1961) (same); 30 Am.Jur.2d *Evidence* § 1071, at 216 (1967 & Supp. 1991) ("Construing a contract of debatable meaning by resort to antecedent negotiations for light as to the meaning of the words used is never a violation of the parol evidence rule.")

[35]2 *Restatement of Contracts 2d* § 212, Comment b, at 126 (1981).

[36]*E.g.*,, Miller v. Green, 183 N.C. 652, 112 S.E. 417, 417-18 (1922) ("if there is latent ambiguity . . . preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended"); Vestal v. Vestal, 271 S.E.2d 306, 309 (1980) (same).

[37]*E.g.*, Brooklyn Life Ins. Co. v. Dutcher, 95 U.S. 269, 273 (1877) (even though no ambiguity was found, "fact must not be overlooked, that the Company . . . always issued paid-up policies upon the basis of the full amount of premiums paid"); *Couch Cyclopedia of Insurance Law* § 79:142 ("Evidence of previous dealings with the insured, and the insurer's general manner of

Carolina law.[38]

The panel should have allowed consideration of the fact that "ERC intended to cover fraud because it deleted from the PTL policy a fraud exclusion it normally includes" (slip op. at 5), ERC's deletion of the clear negligence restriction, ERC's uniform use of a clear negligence restriction and a clear fraud exclusion where "misstatement or misleading statement" were meant to be limited, ERC's description of "expanded coverage" for the "sizable premium" increase of 50%, ERC's official brochure promising "broader coverages" and describing "misstatement or misleading statement" coverage without a negligence restriction, ERC's agent's admission of potential coverage for this suit, and ERC's other agents' admissions of coverage of non-negligent "misstatement or misleading statement"[39].

2. Industry Practices May Be Considered without Any Ambiguity

Second, the extrinsic evidence rule was mistakenly applied to industry practices:

> This Court, moreover, has long emphasized that in interpret-

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doing business through agents, is admissible"); Pan American World Airways, Inc. v. Aetna Cas. & Surety Co., 505 F.2d 989, 1000 n.10 (2d Cir. 1974) ("new clauses").

[38]*E.g.*, Miller v. Green, 183 N.C. 652, 112 S.E. 417, 417-18 (1922) ("if there is latent ambiguity . . . preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended"). *Accord*, Calvert Fire Insurance Co. v. Yosemite Insurance Co., 573 F.Supp. 27, 29, 30 n.2 (E.D.N.C. 1983) (other policy of same insurer was expressly allowed as exception to extrinsic evidence rule); Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 172 S.E.2d 518, 525 (1970) ("'standard provision' of such policies" that was later used); West American Insurance Co. v. Tufco Flooring East, Inc., 409 S.E.2d 692, 696-97 (N.C.App. 1991) (insurer flyer, industry annotations, and experts' analysis allowed, and did not require a finding of ambiguity to admit that extrinsic evidence).

[39]A.1 & 435-36; 327,337,348;325;413,401;1051;056-57,068.

> ing insurance contracts, reference should be made to considerations of business and insurance practices.

Standard Oil Co. v. United States, 340 U.S. 54, 60 (1950). Treatises[40] and North Carolina courts[41] agree.

The panel should have allowed consideration of, rather than excluding, "an expert's opinion [actually four experts'] that the phrase was intended to cover intentional misstatements" under industry and ERC practice. (Slip op. at 5; A.028, 030, 033-34, 037-39, 042.)

3. The Extrinsic Evidence Was Admissible To Show the Circumstances of Entering the Policy, ERC Practices, and Industry Practices

All of the excluded evidence, which the lower courts deemed to be extrinsic, showed the circumstances of entering the Multimedia Policy, and also showed ERC's practices. *See* 4-5 *supra*. That evidence was ERC's own documents, not the extrinsic evidence of third parties. All the affidavits showed industry practice.

CONCLUSION

Thus, the appellate panel conflicted with this Court's decisions on summary judgment and insurance construction, and should be reversed to allow the right to jury trial.

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[40] *E.g.*, Livingston & Gilchrist v. Maryland Ins. Co., 11 U.S. 506, 539, 537 (1813) ("usage may be proved by parol," and it was error to "exclude entirely from the consideration of the jury the regular usage of trade."); 13 *Appleman's Insurance Law and Practice* § 7388, at 187 ("business and insurance practices").

[41] *E.g.*, Glens Falls Indemnity Co. v. Apple & Bond Co., 69 F.2d 695, 698 (4th Cir. 1934) ("custom of casualty insurance companies"); Owens v. Reserve Loan Life Ins. Co., 206 N.C. 864, 175 S.E.203, 205 (1934) ("parol evidence is admissible to explain technical terms"); Stonewall Ins. Co. v. Fortress Reinsurers Managers, Inc., 83 N.C.App. 263, 350 S.E.2d 131, 134 (1986) (even though the disputed policy term was "not ambiguous," nonexpert and expert "parol evidence as to the meaning of the term 'for its own account' was necessary to determine the usual and ordinary meaning of that term in the reinsurance industry").

Respectfully submitted,

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APPENDIX

I. FOURTH CIRCUIT OPINION
II. FOURTH CIRCUIT DENIAL OF REHEARING
III. DISTRICT COURT OPINION
IV. DISTRICT COURT RULE 54(b) ORDER
V. STATUTES

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

EMPLOYERS REINSURANCE CORPORATION,

Plaintiff-Appellee,

v.

JOSEPH W. TEAGUE; HELEN B. TEAGUE; STEVEN ALLEN BARKER; RITA STRAHOWSKI; SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 150,290 Lifetime Partners and of 27,839 persons who have partially paid for Lifetime Partnerships,

Defendants-Appellants,

and

JAMES O. BAKKER; DAVID A. TAGGART; AIMEE CORTESE,

Defendants.

No. 91-2299

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, District Judge.
(CA-90-129-C-C-P)

Argued: May 7, 1992

Decided: August 14, 1992

Before WIDENER and PHILLIPS, Circuit Judges, and KAUFMAN, Senior United States District Judge for the District of Maryland, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Wendell R. Bird, BIRD & ASSOCIATES, Atlanta, Georgia, for Appellants. Michael Terry Medford, MANNING, FULTON & SKINNER, P.A., Raleigh, North Carolina, for Appellee. **ON BRIEF:** David J. Myers, BIRD & ASSOCIATES, Atlanta, Georgia; Thomas T. Anderson, Samuel F. Trussell, THOMAS T. ANDERSON & ASSOCIATES, Indio, California; Janathan P. Wallas, FERGUSON, STEIN, WATT, WALLAS, ADKINS & GRESHAM, Charlotte, North Carolina, for Appellants. Charles E. Nichols, Jr., MANNING, FULTON & SKINNER, P.A., Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Joseph Teague, on behalf of a class of "lifetime partners" and partial lifetime partners in the Praise The Lord organization (PTL), appeals a summary judgment order which concluded as a matter of law that PTL's libel and allied torts indemnity policy (policy), issued to PTL by Employers Reinsurance Corporation (ERC), does not cover fraudulent activities of PTL founder, Jim Bakker. Because we agree with the district court's conclusion that the policy language at issue was unambiguous and that the policy does not cover Bakker's intentional acts, we affirm.

I.

In 1987, PTL lifetime partners (including the Teague class) filed suit against Bakker and other PTL officials, alleging that Bakker had committed fraud in the lifetime partner program. The lifetime partners contributed to PTL in exchange for the right to stay in PTL accommodations for a certain number of nights each year. The partners sued when PTL could no longer provide the accommodations after its bankruptcy in 1987. They alleged that Bakker fraudulently oversold the lifetime partnerships and diverted PTL assets, knowing that PTL could not provide the promised accommodations. Bakker was convicted in 1989 of wire fraud, mail fraud and conspiracy for the same conduct. In January 1991, the lifetime partner class won a $129,747,618.00 civil judgment against Bakker for common law fraud.[1]

During the time of Bakker's fraudulent activities, PTL held an ERC insurance policy protecting PTL against liability resulting from libel, slander, invasion of privacy, copyright infringement, trespass in the acquisition or publication of a story, and other tortious activities. Section I(a)(7) of the policy covers liability arising from "negligent error, omission, misstatement or misleading statement." This language is at the heart of the instant dispute.

ERC filed this diversity action against Bakker in April of 1990 in the Western District of North Carolina. ERC sought a declaration that its insurance policy does not indemnify Bakker for claims by defrauded lifetime partners. The Teague class intervened as defendants, arguing that the policy covers indemnification for Bakker's fraudulent activities. The district court granted ERC's motion for summary judgment, holding that the policy language at issue was unambiguous and that it did not include coverage for Bakker's intentional misstatements. Teague's appeal followed.

II.

We review a summary judgment *de novo*. *Cohn v. Bond*, 953 F.2d 154, 157 (4th Cir. 1991). Summary judgment is proper where the

[1]Two other PTL officials, Aimee Cortese and David Taggert, were also defendants in the civil action, but the jury found for them on all claims.

pleadings, depositions, interrogatories and admissions on file, with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(c). Since there is no dispute regarding the facts, and the matter is reduced to a narrow question of contract interpretation, we must decide only whether ERC is entitled to judgment as a matter of law under the policy. *Radiator Specialty Co. v. First State Ins. Co.*, 651 F. Supp. 439 (W.D.N.C. 1987), *aff'd*, 836 F.2d 193 (4th Cir. 1987).

Teague argues that in the phrase "negligent error, omission, misstatement or misleading statement," the adjective "negligent" modifies only "error," resulting in coverage for any type of misstatement, including fraudulent misstatements. Teague alternatively argues that the phrase is at least ambiguous and that the district court therefore erred in refusing to consider, as aids in construing the policy, a comparison of the PTL policy with other ERC media policies and expert testimony interpreting the language. This extrinsic evidence, Teague argues, supports the conclusion that the policy covers common law fraud. Although the two lines of argument are intimately tied, we consider first whether the language in question is ambiguous and then whether that language, on its own and in the context of the policy, includes coverage for fraudulent misstatements.

A.

Teague contends that the clause covering "negligent error, omission, misstatement or misleading statement" is at least ambiguous to the extent that it is not clear whether "negligent" modifies all four terms in the series. Teague argues that "negligent" modifies only error and that the policy thereby covers nonnegligent or intentional omissions, misstatements or misleading statements. The district court rejected this argument, finding that the clause is unambiguous and that, in accordance with grammatical rules and popular usage, the adjective "negligent" modifies every word in the series. We agree.

Under North Carolina law, which governs the resolution of this diversity matter, we can not find ambiguity merely on the basis of a difference of opinion between the parties on the interpretation of a policy provision. *Brown v. Lumbermens Mutual Casualty Co.*, 390

S.E.2d 150, 153 (N.C. 1990). Ambiguity is not established by party disagreement unless the parties' varying interpretations fairly and reasonably arise from the policy language. *Big B Transportation, Inc. v. United States Insurance Group*, 377 S.E.2d 278 (N.C. App. 1989). We believe Teague's interpretation of the clause is strained, and we agree with other courts which have held, construing comparable provisions, that the adjective preceding a series of nouns modifies every noun in the series. *See United States Fidelity & Guaranty Co. v. Fireman's Fund Insurance Co.*, 896 F.2d 200, 203 (6th Cir. 1990) (the only reasonable construction of "negligent act, error, or omission" is that the policy covers only negligent behavior); *Golf Course Superintendents Assn. v. Underwriter's at Lloyd's, London*, 761 F. Supp. 1485, 1490 (D. Kan. 1991) (in the phrase "negligent act, error, omission misstatement or misleading statement," "negligent" modifies every relevant item in the series). Teague points to only one case to the contrary. In *Aitchison v. Founders Ins. Co.*, 333 P.2d 178 (Cal. 1958), the court held that the phrase "negligent error, act, or omission" included coverage for errors which were the result of nonnegligent, honest mistakes. However, *Aitchison* alone does not create enough uncertainty regarding the meaning of the phrase to establish ambiguity. Even *Aitchison* did not interpret the clause to include intentional acts.

Under North Carolina law, which controls, unambiguous policy language is to be construed without resort to extrinsic evidence to "aid" in its interpretation. *Metric Constructors, Inc. v. Industrial Risk Insurers*, 401 S.E.2d 126, 128 (N. C. 1991). The district court therefore properly declined to consider Teague's proffers of extrinsic evidence, specifically, an expert's opinion that the phrase was intended to cover intentional misstatements and Teague's assertion that ERC intended to cover fraud because it deleted from the PTL policy a fraud exclusion it normally includes in media policies.

B.

We agree with the district court's conclusion that the unambiguous policy clause, taken on its own and in the context of the policy as a whole, does not cover intentional misstatements. Reading "negligent" as modifying every noun in the series of covered risks, "negligent errors, omissions, misstatements or misleading statements," inten-

tional misstatements simply are not included. This interpretation is explicitly supported by *Golf Course* and *Fireman's Fund*. It is implicitly supported by a prior decision of this court in *Western World Ins. Co. v. Harford Mutual Ins. Co.*, 784 F.2d 558, 462-63 (4th Cir. 1986), in which we opined in dicta that an intentional action would not be covered by policy language covering "negligent acts, errors, or omissions."

Accordingly, we agree with the district court's determination that the unambiguous phrase in the policy and the policy as a whole do not include coverage for the type of fraudulent misstatement which formed the basis of the civil judgment against Bakker.[2]

III.

For the foregoing reasons, we affirm the district court's summary judgment for ERC. The PTL policy does not include coverage for intentional misstatements, and ERC has no duty to indemnify Bakker for the civil judgment levied against him for common law fraud.

AFFIRMED

[2]So holding, we need not consider ERC's alternative contention that if the policy were read as covering the fraud here in issue, it would be void as against public policy. *See Graham v. James F. Jackson Assocs., Inc.*, 352 S.E.2d 878, 881 (N.C. App. 1987) ("The general rule prohibiting insurance against liability for criminal acts advances a legitimate public policy interest against relieving a wrongdoer from responsibility for his own wilful and wrongful act, in order that the commission of such acts not be encouraged.").

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 24, 1992

No. 91-2299
CA-90-129-C-C-P

EMPLOYERS REINSURANCE CORPORATION
Plaintiff - Appellee

v.

JOSEPH W. TEAGUE; HELEN B. TEAGUE, STEVEN ALLEN BARKER; RITA STRAHOWSKI; SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 150,290 Lifetime Partners and of 27,839 persons who have partially paid for Lifetime Partnerships
Defendants - Appellants

and

JAMES O. BAKKER; DAVID A. TAGGART; AIMEE CORTESE
Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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Appellants filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the

suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Phillips, with the concurrence of Judge Widener and Judge Kaufman, Senior District Judge, sitting by designation.

For the Court,

/s/ Bert M. Montague

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-90-129-P

EMPLOYERS REINSURANCE CORPORATION,	)	
Plaintiff,	)	
v.	)	MEMORANDUM OF DECISION AND ORDER
JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE,	)	
Defendants.	)	
JOSEPH W. and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 160,904 Lifetime Partners and of 29,805 persons who have partially paid for Lifetime Partnerships,	)	
Intervening Defendants.	)	

THIS MATTER is before the Court on Motion of the Plaintiff, filed 14 August 1991, for Partial Summary Judgment and on Motion of the Plaintiff, filed 10 September 1991, and renewed on 4 October 1991, to Strike or Dismiss and or Sever Teague Intervenors' Purported Counterclaims.

Factual and Procedural Background

This action is but a part of the litigation arising out of the fall of Jim Bakker and the consequent disintegration of PTL. As such, the factual and procedural antecedents of this action are many and complex; fortunately, not all need to be detailed here.

It is, rather, sufficient to note that in November of 1992, Plaintiff Employers Reinsurance Corporation ("ERC"), issued an insurance policy to Heritage Village Church. That policy, a Multimedia Liability Policy, Policy Number MML-044 (the "Multimedia Policy") insured Heritage Village Church and additional insureds, including Defendant Bakker and possibly Defendants Taggart and Cortese. The Multimedia Policy, renewed annually through 18 December 1987, provided the insureds with indemnification for specified losses sustained by the insureds.

In relevant part, the Multimedia policy provides:

> COVERAGE. (a) Media Liability. The Corporation hereby agrees to indemnify the Insured against such loss in excess of the applicable retention and within the limit specified in the declarations as the Insured sustains by reason of liability imposed by law or assumed under contract for damages because of injury sustained by any person or organization arising out of;
>
> (1) libel or slander or other defamatory or disparaging material;
>
> (2) invasion or infringement of the right of privacy, including unwarranted or wrongful publicity or the unlawful use of name or likeness for profit;
>
> (3) plagiarism, piracy or misappropriation of information or ideas;

(4) infringement of copyright, title or slogan;

(5) unfair competition by means of the invasion, misuse, misappropriation or infringement of literary or artistic property rights of another;

(6) trespass;

(7) negligent error, omission, misstatement or misleading statement;

committed or alleged to have been committed in the acquisition, researching, filming, videotaping, preparation, utterance or dissemination of matter published, republished, produced, distributed, leased, broadcast, telecast, cablecast, syndicated, exhibited, or advertised during the policy period by or with the permission of the insured.

Multimedia Policy, Section I. The correct interpretation of this language became necessary in November of 1987 when contributors to PTL - Lifetime Partners - filed a class action against Defendants Bakker, Taggart, Cortese, and others (the "Teague Action").

The Teague Action was tried before the Honorable James B. McMillan in Charlotte, North Carolina. On 14 December 1990, after an eight week trial, the jury found that Defendant Bakker committed common law fraud proximately causing damages of $129,618,000.00. In addition, the jury awarded the Teague Action Plaintiffs punitive damages totalling $129,618.00. The jury also found that neither David A. Taggart nor Aimee Cortese were liable for any damages to the Teague Action Plaintiffs. Accordingly, on 4 January 1991, Judge McMillan ordered inter alia that the Teague Action Plaintiffs recover of Defendant Bakker $129,618,000.00 as compensatory damages and $129,618.00 as punitive damages, plus legal interest.

In the interim, on 27 April 1990, ERC brought this action, seeking a declaratory judgment that "the Multimedia Policy does not provide any coverage for any claims asserted in the Teague

Class Action and that ERC has no obligation to defendants in connection with the Teague Class Action or the Multimedia Policy." Complaint of the Plaintiff at 8 (27 April 1990). On 30 May 1990, the Teague Action Plaintiffs moved to intervene as a matter of right in this action. On 9 August 1990, this Court denied the Teague Intervenor's Motion. On 26 December 1990, the Teague Action Plaintiffs renewed their Motion to Intervene. This Court, on 8 March 1991, again denied the Teague Intervenor's Motion. The Teague Intervenors appealed, and on 25 April 1991, the Fourth Circuit Court of Appeals reversed, holding that the Teague Action Plaintiffs were entitled to intervention as a matter of right.

Accordingly, on 11 July 1991, this Court ordered that the Teague Action Plaintiffs be allowed to intervene as a matter of right in this action. On 31 July 1991, the Teague Intervenors filed an amended answer and counterclaim setting forth contract and tort claims against the Plaintiff.

Following intervention by the Teague Action Plaintiffs, ERC filed the Motion for Partial Summary Judgment now before the Court. Subsequently, on 28 August 1991, the Teague Intervenors moved for a stay of the Plaintiff's Motion for Partial Summary Judgment or for an extension of time in which to respond. This Court, on 14 September 1991, denied the Intervenor's Motion to Stay. On 10 September 1991, the Plaintiff moved to strike or dismiss the purported counterclaims of the Teague Intervenors. In addition, other non-dispositive Motions have been filed by the parties. Those Motions are not now before the Court.

Discussion

Summary judgment is appropriate when the pleadings, responses to discovery, and the record reveal that no genuine issue of any material fact exists and that the moving party is entitled to

judgment as a matter of law. See Rule 56(c) of the Federal Rules of Civil Procedure. The party moving for summary judgment has the initial burden of showing that no genuine issue of any material facts exists and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has met its burden, the non-moving party must come forward with specific facts showing that evidence exists to support its claims and that a genuine issue for trial exists. Id.; Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); see F.R. Civ. 56(e) (in response to motion for summary judgment, "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). When considering motions for summary judgment, courts must view facts and inferences in the light most favorable to the party opposing the motion for summary judgment. Matsushita, 475 U.S. at 587-88; United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). When, however, the evidence from the entire record could not lead a rational fact-finder to find for the non-moving party, no genuine issue for trial exists and summary judgment is appropriate. Matsushita, 475 U.S. at 587.

Here, the Court has before it Plaintiff's Motion for Partial Summary Judgment; Plaintiff's Brief in Support of Motion for Partial Summary Judgment; Plaintiff's Appendix of Materials in Support of Motion for Partial Summary Judgment; Defendants' Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment; Defendants' Affidavits for Response to Plaintiff's Motion for Partial Summary Judgment; Plaintiff's Reply Brief in Support of Partial Summary Judgment; and Defendants' Reply in Opposition to

Plaintiff's Motion for Partial Summary Judgment. These materials state in thorough detail the competing contentions of the Parties.

In the end, those contentions revolve around a single clause of the Multimedia Policy. As such, Plaintiff's Motion for Partial Summary Judgment calls upon the Court to correctly interpret that clause. Not surprisingly, ERC and the Teague Intervenors put forth mutually exclusive interpretations of the questioned clause.

As noted above, the Multimedia Policy provides that ERC will indemnify the insureds for losses arising out of the "negligent error, omission, misstatement or misleading statement" of the insureds. Multimedia Policy, Section I(a)(7). The Teague Intervenors argue that this clause includes intentional misstatements or misleading statements, and thereby provides coverage for losses occasioned by fraud. In contrast, ERC argues that only negligently made misstatements or misleading statements are included within this clause. As such, misstatements or misleading statements intentionally made to defraud are not within this clause. The importance of this distinction is related to the fraud judgment obtained by the Teague Intervenors in the Teague Action: only under the interpretation offered by the Intervenors does ERC suffer an obligation arising from that judgment.

This Court, faced with these two opposing interpretations, must examine the policy and determine which of the offered interpretations is proper. This question is one of the law. Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 354, 122 S.E.2d 518, 522 (1970). In answering this question, the Court must turn for guidance to well-established rules of construction. Id. The Court's objective in this inquiry must be to determine the coverage intended by the Parties when ERC issued the policy. Id.

As an initial matter, the Court notes that it is here

considering the propriety of summary judgment. In a case turning upon the interpretation of language in an insurance policy, summary judgment is appropriate only where the language is unambiguous. Further, no language is unambiguous if it is susceptible to two reasonable interpretations. Radiator Specialty Co. v. First State Ins. Co., 651 F.Supp. 439 (W.D.N.C. 1987), aff'd per curiam, 836 F.2d 193 (4th Cir. 1987) (quoting American Fidelity & Casualty Co. v. London & Edinburgh Ins. Co., 354 F.2d 214, 216 (4th Cir. 1965)).

In assessing the ambiguity of language contained in an insurance policy, a court must take care to recall fundamental principles long ago noted by the North Carolina Supreme Court:

> [A]mbiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning. No ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. . . . If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policy holder did not pay.

Wachovia, 276 N.C. at 354, 122 S.E.2d at 522 (citations omitted). In addition, unless the context clearly requires otherwise, nontechnical words must be interpreted in a manner consistent with the sense such words are used in ordinary speech. Id.

The clause at issue here is short: it contains only seven words. The Court has reviewed carefully that clause and the entire Multimedia Policy. The Court has also considered the arguments of the Parties and relevant legal authority. Having done so, the Court finds that the clause "negligent error, omission, misstatement or misleading statement" is not reasonably susceptible of two varying interpretations.

As noted by both ERC and the Teague Intervenors, the questioned clause is an elliptical construction. Although the Teague Intervenors protest otherwise, such grammatical devices are commonly used in both speech and writing. See e.g., H. Fowler, The Little, Brown Handbook 251 (2d ed. 1983). As Professor Fowler notes, elliptical constructions "omit words not necessary for meaning." Id. Professor Fowler illustrates: "Some people heat by oil, some (heat) by gas, others (heat) by electricity." Id. In the quoted example, the words in parentheses can be omitted without disturbing the clarity or meaning of the sentence.

So it is with the clause, "negligent error, omission, misstatement or misleading statement." It simply is not necessary to write "negligent error, negligent omission, negligent misstatement or negligent misleading statement" to ensure clarity of meaning or purpose. That "negligent" modifies each of the four nouns in the clause is entirely consistent with common usage and, most important, with the intent of the Parties. For, if as the Teague Intervenors assert, "negligent" modifies only "error," the clause is meaningless. The Parties could not have intended to cover only negligent errors, but then also to cover intentional omissions, misstatements, or misleading statements. Such a construction would be internally inconsistent and would, in effect, delete "negligent" from the clause. See e.g., Golf Course Superintendents Ass'n of America v. Underwriter's at Lloyd's, London, 761 F.Supp. 1485, 1490 (D.Kan. 1991) ("It would be self-defeating to limit the definition of 'wrongful act' to negligent acts, but at the same time cover intentional errors or omissions").

Because the Court finds that the clause here at issue is not reasonably susceptible to two conflicting interpretations, the parol evidence offered by the Teague Intervenors is not

admissible. See e.g., United States for West Chester Electric & Electronics Co., Inc. v. Sentry Ins., 774 F.2d 80, 84 (4th Cir. 1985) ("Parol evidence is inadmissible to vary the terms of an unambiguous agreement"); Radiator Speciality, 651 F.Supp. at 440 (only an ambiguous provision justifies introduction of extrinsic evidence). Where the Court can, as here, examine questioned language and determine the unambiguous meaning of that language, it is of no moment what other documents provide or what insurance experts proclaim. Thus, the Teague Intervenors cannot meet their burden of demonstrating "specific facts showing that there is a genuine issue for trial." F. R. Civ. P. 56(e). Summary Judgment, then, is appropriate for the Plaintiff on this issue.

Finally, the Court finds that given the Court's interpretation of the Multimedia Policy and consequent entry of Summary Judgment, the counterclaims of the Teague Intervenors are without merit. In brief, those claims assert that the Plaintiff refused, in bad faith and in breach of the Multimedia Policy, to investigate, settle, or pay the claims of the Teague Intervenors. This Court has found that the Multimedia Policy does not extend to fraud. Given that the Teague Intervenors have a judgment against Defendant Bakker grounded in common law fraud, it is apparent the Plaintiff had no duty to investigate, settle, or pay the claims of the Teague Intervenors. Accordingly, the Court will dismiss the counterclaims of the Teague Intervenors.

Conclusion

The Court has considered carefully the arguments of the Parties, the language of the Multimedia Policy, and relevant legal authority. Having done so, the Court finds that the clause "negligent error, omission, misstatement or misleading statement" is not reasonably susceptible to two alternative interpretations. Further, the Court finds that the clause extends only to negligent

conduct, and thus does not cover losses occasioned by fraud. Accordingly, partial summary judgment is appropriate for the Plaintiff. In addition, and as a result, the Court has found that the counterclaims of the Teague Intervenors are without merit and should be dismissed.

NOW, THEREFORE, IT IS ORDERED that the Motion of the Plaintiff for Partial Summary Judgment be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the Motion of the Plaintiff to Strike or Dismiss Counterclaim be, and hereby is, GRANTED.

This the [16th] day of October, 1991.

[ROBERT D. POTTER]
ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Civil Action C-C-90-0129-P

EMPLOYERS REINSURANCE CORPORATION, Plaintiff, v. JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE, Defendants. JOSEPH W. and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 160,904 Lifetime Partners and of 29,805 persons who have partially paid for Lifetime Partnerships, Intervening Defendants.	)	ORDER

THIS MATTER is before the Court on joint motion of all parties for entry of an order directing entry of judgment pursuant to Rule

54(b) and for a stay pending appeal of partial summary judgment.

IT APPEARS to the Court that the relief requested by the joint motion is proper.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The Partial Summary Judgment entered by this Court on October 17, 1991 is hereby amended by adding the following additional language immediately following the words "that certain case C-C-87-514-M":

> The Court hereby determines, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in the entry of final judgment on the claims resolved by this Partial Summary Judgment, and the Court hereby directs entry of final judgment on such claims.

2. The trial of this action and all further proceedings in this action, except as expressly provided below, are stayed until the mandate issues from the Court of Appeals in any appeal from the entry of Partial Summary Judgment or the dismissal of such appeal, whichever occurs first.

3. The foregoing stay shall not apply (a) to matters relating to appeal from the Partial Summary Judgment (including but not limited to the matters relating to the record for such appeal) and (b) motions relating to the motions to dismiss the Teague Intervenor's crossclaims filed by the other defendants; provided, however, that this exclusion of such motions from the stay shall be without prejudice to a motion by Teague Intervenors to stay resolution of such motions as well. The Court's decision as to whether resolution of the motions to dismiss and matters related thereto should be stayed shall be determined separately by the Court.

4. This order is without prejudice to the right of any party to seek limited relief from the stay should future circumstances so warrant.

This the [13th] day of November, 1991.

[Robert D. Potter]
Robert D. Potter
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
C-C-90-129-P

EMPLOYERS REINSURANCE CORPORATION, Plaintiff,	)	
v.	)	ORDER
JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE, Defendants.	)	
JOSEPH W. and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as representatives of a nationwide class consisting of 160,904 Lifetime Partners and of 29,805 persons who have partially paid for Lifetime Partnerships, Intervening Defendants.	)	

THIS MATTER is before the Court on Motion of Intervening Defendants, filed 22 October 1991, to Supplement Record. On 7

November 1991, Plaintiff filed a response to the Motion of Intervening Defendants. On that same date, Plaintiff also moved to supplement the record. On 12 November 1991, Intervening Defendants filed a reply to Plaintiff's response, and on 15 November 1991, Plaintiff, by letter, informed the Court of alleged inaccuracies contained in the 12 November 1991 reply of Intervening Defendants. On 18 November 1991, Intervening Defendants, by letter, disputed these alleged inaccuracies. Further, on 15 November 1991, this Court entered a Consent Order supplementing the record. This Consent Order resolved all issues regarding supplementation of the record save for three documents and a supporting deposition and affidavit. Those documents are:

PTL DOCUMENT 85060-65

PTL DOCUMENT 85084-85

PTL DOCUMENT 85090

DEPOSITION OF ROBERT FRANCISCO (19 September 1991)

AFFIDAVIT OF JONATHAN WALLAS (22 October 1991)

Plaintiff objects to the addition of the above-noted documents on several grounds. In support of its argument, Plaintiff asserts that the challenged documents were not cited in any brief submitted to the Court by Intervening Defendants. As such, Plaintiff argues it would be improper to supplement the appellate record with these documents. Intervening Defendants respond by arguing that Plaintiff possessed two of the three documents, that the third is similar to the second, and that adding these records will not prejudice Plaintiff.

The Court has considered carefully the arguments of both Plaintiff and Intervening Defendants. Having done so, the Court finds that the Motion of Intervening Defendants is without merit. Accordingly, the Court will not allow these challenged documents to be added to the record.

Documents which were "neither filed with the district court, considered by the court, nor even before the court when it entered [the Order appealed from,]" should not be made a part of the appellate record. Kirshner v. Uniden Corp. of America, 842 F.2d 1074 (9th Cir. 1988). Intervening Defendants acknowledge that none of the challenged documents was before the Court when it granted Plaintiff partial summary judgment. Accordingly, the documents should not be added to the record. See also First Nat'l Bank of North East v. Fockler, 649 F.2d 213, 215-16 (4th Cir. 1981).

NOW, THEREFORE, IT IS ORDERED that the Final Motion of Intervening Defendants to Supplement Record be, and hereby is, DENIED.

This the [19th] day of November, 1991.

[ROBERT D. POTTER]
ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE

(2)

No. 92-850

Supreme Court, U.S.
FILED
DEC 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JOSEPH W. TEAGUE and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as Respresentatives of a Nationwide Class Consisting of 150,290 Lifetime Partners and of 27,839 Persons Who Have Partially Paid for Lifetime Partnerships,

Petitioners,

v.

EMPLOYERS REINSURANCE CORPORATION,

Respondent,

JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE,

Defendants.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Fourth Circuit correctly hold that, under North Carolina substantive law, the interpretation of the plain, unambiguous language of the Multimedia Policy was a legal issue, not a question of fact?

II. Did the Fourth Circuit correctly interpret the Multimedia Policy and correctly hold that North Carolina law does not permit Teague to change the plain terms of the policy by distorting the policy's language or using irrelevant and inadmissible extrinsic evidence?

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No. 92-850

In The

Supreme Court of the United States

October Term, 1992

JOSEPH W. TEAGUE and HELEN B. TEAGUE, STEVEN ALLEN BARKER, RITA STRAHOWSKI, and SWANNEE BECK, Lifetime Partners of PTL, as Respresentatives of a Nationwide Class Consisting of 150,290 Lifetime Partners and of 27,839 Persons Who Have Partially Paid for Lifetime Partnerships,

Petitioners,

v.

EMPLOYERS REINSURANCE CORPORATION,

Respondent,

JAMES O. BAKKER, DAVID A. TAGGART, and AIMEE CORTESE,

Defendants.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Employers Reinsurance Corporation ["ERC"] opposes the Petition for Writ of Certiorari in this case. Joseph Teague and others ["Teague"] ask this Court to review an unreported decision by the United States Court of Appeals for the Fourth Circuit affirming, *per curiam*, an unreported district court opinion granting

summary judgment on an issue of state law. Both the Fourth Circuit and the district court held that a libel and allied torts indemnity policy [the "Multimedia Policy"] issued to PTL by ERC, does not indemnify James O. Bakker ["Bakker"] for liability for his own common law fraud.

The Fourth Circuit's unanimous decision in this diversity action rests solely on state law. The circuits are not split on any federal principle which would affect the outcome. Thus, the case does not present an issue of federal law for resolution by the Supreme Court.

In addition, the Fourth Circuit, like the District Court, decided the controlling state law question correctly.

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND.

ERC filed this diversity action in the United States District Court for the Western District of North Carolina on April 27, 1990. It sought a declaration that the Multimedia Policy does not indemnify PTL officers and directors for claims by persons defrauded by PTL's "lifetime partner" program. The original defendants were Bakker, David Taggart and Aimee Cortese, three former PTL officers and directors against whom such claims had been made. Teague intervened on behalf of a class of "lifetime partners" whom he represents in a class action against Bakker, Taggart, Cortese and others [the *"Teague* Class

Action"]. Teague claims that the Multimedia Policy covers the judgment for common law fraud entered against Bakker in the *Teague* Class Action.[1]

On October 16, 1991, after discovery and full briefing, the district court granted ERC's motion for summary judgment that the Multimedia Policy does not indemnify Bakker for the fraud judgment. [App. 1032.][2] The court entered final judgment pursuant to Rule 54(b), Fed. R. Civ. P. [App. 1033-34.]

Teague's appeal was fully briefed, and a panel of the Fourth Circuit heard oral argument on May 7, 1992. On August 14, 1992, the panel unanimously affirmed the district court's judgment. [Appendix to Petition for Certiorari at A-1.] The court then denied Teague's Petition for Rehearing and Suggestion for Rehearing *En Banc*, by order filed September 24, 1992. [*Id.* at A-7.]

II. FACTUAL BACKGROUND.

A. PTL's Purchase Of The Multimedia Policy.

PTL bought the Multimedia Policy to protect itself against "libel, slander and related actions." In 1980, an insurance consultant's report reviewed PTL's entire insurance program [App. 761-76] and recommended, among other things, that PTL get libel coverage:

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[1] Teague also contended that the policy covered claims against Cortese and Taggart, but trial of the *Teague* Class Action mooted that contention. The lifetime partners lost on all claims against Taggart and Cortese, and they won against Bakker solely on common law fraud. [App. 713-17.]

[2] References to "App." in this brief refer to the Joint Appendix filed with the Fourth Circuit.

> PTL's broadcasting and telecasting activities expose the organization to potential suits arising out of libel, slander and related actions. No insurance is in effect for these exposures.

[App. 776.] PTL's "insurance coordinator," Dave Cadwell, implemented the consultant's recommendation by obtaining an ERC libel and related torts policy for PTL's Ohio television station, WJAN-TV, effective November 1980. [App. 757-58 (¶ 9).]

In 1982, PTL, through Mr. Cadwell, elected to extend the coverage to PTL's Charlotte operations. [App. 410; 758 (¶ 10).] ERC quoted and bound the coverage based on its "Broadcasters Broadform" policy [App. 435-37], but it actually issued the policy on its "multimedia policy" form because PTL used both print and broadcast media. The resulting Policy No. MML-044 [App. 1-26] is at issue in this case.

Mr. Cadwell's uncontradicted testimony is that he did not believe that the policy covered fraud. [App. 118-21.] He did not seek coverage for fraud liability, and he did not think that he had acquired any fraud coverage. [App. 759 (¶¶ 14-15).]

B. The Multimedia Policy.

The Multimedia Policy is not a comprehensive liability policy. It is a "specified risk" indemnity policy covering only specified torts in connection with broadcast or publication of material. [App. 2-3 (Policy Section I).] Chief among those are libel and slander, but the policy also covers related torts such as invasion of privacy, copyright infringement, and trespass in the acquisition or publication of a story. [*Id.* Section I(a)(1)-(6).]

The policy also covers negligent broadcasting or publishing mistakes that cannot be pigeonholed into traditional torts such as libel, slander or invasion of privacy. *See, e.g., Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983) (publisher of a book of airport approach information sued for erroneous information which allegedly resulted in crash). These non-traditional negligent publication claims are covered by Section I(a)(7) of the policy [App. 2] which covers liability arising from

> *negligent* error, omission, misstatement or misleading statement [in the broadcast or publication of material][emphasis added].

The Multimedia Policy does not contain any provision covering liability for *fraudulent* error, omission, misstatement or misleading statement in broadcasts or publications.

C. Claims By Lifetime Partners.

In 1987, certain PTL "lifetime partners" filed lawsuits (including the *Teague* Class Action) against Bakker and others.[3] The lifetime partners contributed money to PTL for the right to stay in PTL's accommodations for a certain number of nights each year. The "partners" sued when PTL could no longer provide the promised accommodations after its bankruptcy in the wake of the Jessica Hahn scandal in 1987. They alleged that Bakker fraudulently oversold the lifetime partnerships and diverted

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[3] Despite the Multimedia Policy's prompt notice requirement, [App. 5-6 (Section VII)], neither Bakker nor anyone else notified ERC of these lawsuits – or contended that the claims were covered by the Multimedia Policy – for more than two years. [App. 881-882 (¶¶ 3-4).]

PTL assets, knowing that PTL could not provide the promised accommodations. [App. 575-682.]

D. The Judgment Against Bakker.

The basis of the class action judgment against Jim Bakker is clear. He already had been convicted of wire fraud, mail fraud and conspiracy for the same conduct. [App. 753.] Teague told the jury that

> on October 5, 1989, Jim Bakker was convicted of Lifetime Partnership fraud. On those same set of facts that Jim Bakker was convicted on, we are bringing this cause of action.

[App. 754.] Not surprisingly, the verdict against Bakker was *expressly and solely* for common law fraud. [App. 713-17.]

SUMMARY OF ARGUMENT

This is not an appropriate case for certiorari because the only issue is the application of North Carolina substantive law to determine whether the Multimedia Policy covers the judgment for common law fraud. Teague's attempt to disguise that state law issue as a federal question cannot withstand scrutiny. Contrary to his argument, the circuits are not split on the summary judgment standard. More important, the courts below did not "weigh" any evidence or impose any burden of proof on Teague. North Carolina law makes interpretation of the Multimedia Policy a question of law to be decided by the court based solely on the face of the policy without resort to extrinsic evidence. Questions about "burden of proof" and "evidence weighing" are irrelevant when the sole task before the court is making a legal interpretation, not

deciding whether there is enough evidence to create an issue of fact.

Even if it were proper for Teague to use this court to rehash state law issues on which he has been fully heard in two courts, his petition is without merit. The district court and the Fourth Circuit applied the plain meaning of the Multimedia Policy as required by North Carolina law and reached the same conclusion as other courts considering similar policy language. Teague's effort to avoid the policy's plain meaning through strained readings, parol evidence and mischaracterizations of the evidence are contrary to North Carolina law.

ARGUMENT

I. THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION REQUIRING REVIEW BY THE SUPREME COURT.

This case did not involve federal law. The sole issue was controlled by state law, and the courts below followed procedural principles upon which the Supreme Court and all circuits agree. The decision has little significance to anyone beyond the parties to this case – a fact emphasized by the absence of any reported opinion. Teague simply quarrels with the application of North Carolina law by the district court and the Fourth Circuit, and he seeks a third bite at the apple in violation of this Court's long-standing admonition that the certiorari jurisdiction exists solely

> to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to

> give the defeated party in the Circuit Court of Appeals another hearing.

Magnum Import Co. v. Coty, 262 U.S. 159 (1923).

A. The Court Should Not Grant Certiorari To Second Guess The Fourth Circuit's Application Of North Carolina Law.

Teague does not dispute that North Carolina law governs this case. No such dispute would be possible. The case is in federal court only because of the parties' diverse citizenship, and the sole issue is interpretation of an insurance policy issued to an insured in North Carolina.

Teague does argue, however, that the district court and the Fourth Circuit misapplied North Carolina law. [Petition for Certiorari at 15-31]. As shown in Part II below, that argument is wrong; but it would not justify review by the Supreme Court in any event.

The Supreme Court has long recognized that it does not exist to second guess the courts of appeal on state law questions. *E.g., Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944):

> [O]rdinarily we accept and therefore do not review, save in exceptional circumstances, the considered determination of questions of state law by the intermediate federal appellate courts . . .

See also, Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations [of state law] in the first instance."). Thus, the Court seldom has granted certiorari to review state law decisions, and in 1980 it deleted from its rules

the provision for certiorari to review state law issues. 13 *Moore's Federal Practice* ¶ 810.25-1[3].

This is not a case in which the Court should depart from its practice of deferring to the courts of appeal on state law issues. The Fourth Circuit and district court correctly applied North Carolina law, and their decisions are unlikely to govern a substantial number of other cases since they were unreported and relate solely to the interpretation of the Multimedia Policy with respect to one type of judgment.

B. Teague's Attempt To Create The Illusion Of A Federal Question Is Without Merit.

Teague fails in his attempt to disguise the controlling state law question as a federal issue. Teague's theory is that the Court should grant certiorari to resolve a split among the circuits about the propriety of weighing evidence on a motion for summary judgment and the role of the burden of proof on summary judgment. [Petition for Certiorari at 7-14.]

While no such split among the circuits exists, this would not be an appropriate case for resolving the split if it did exist. Contrary to Teague's argument, the Fourth Circuit neither weighed any evidence nor imposed any burden of proof on Teague. Indeed, those concepts had no relevance to its decision because North Carolina substantive law made interpretation of the Multimedia Policy an issue of law, not a question of fact.

The Fourth Circuit correctly noted that the facts material to ERC's motion for summary judgment under controlling North Carolina law were – and are – undisputed. The Multimedia Policy is in writing [App. 1-26], and the parties do not dispute its contents. Nor does any

dispute exist about the basis for Bakkers' liability to the lifetime partners. The fraud judgment against Bakker [App. 713-17] and Bakker's criminal indictment and conviction for the same conduct [App. 725-53] are both in writing. The *Teague* verdict was expressly for common law fraud.

The Fourth Circuit noted correctly that North Carolina law makes interpretation of the Multimedia Policy on these undisputed facts a question of law, and it based its decision squarely on that controlling principle of North Carolina substantive law, not on weighing the evidence:

> Since there is no dispute regarding the facts, and the matter is reduced to a narrow question of contract interpretation, we must decide only whether ERC is entitled to judgment as a matter of law under the policy. *Radiator Specialty Company v. First State Insurance Company*, 651 F.Supp. 439 (W.D.N.C. 1987), *aff'd*, 836 F.2d 193 (4th Cir. 1987).
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> * * *
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> Under North Carolina law, which controls, unambiguous policy language is to be considered without resort to extrinsic evidence to "aid" in its interpretation. *Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 401 S.E.2d 126, 128 (N.C. 1991). The District Court therefore properly declined to consider Teague's proffers of extrinsic evidence . . .

[Appendix to Petition for Certiorari at A-4 and A-5.]

Nor did the Fourth Circuit impose any burden of proof or burden of production on Teague.[4] There are no

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[4] Contrary to Teague's argument, he would bear the burden of proof if there were any material issues of fact relating to

burdens of proof or production on issues of law. All relevant facts (i.e. the text of the Multimedia Policy and the Teague Class Action judgment) were before the Court.

The Fourth Circuit's conclusion that interpretation of the Multimedia Policy is an issue of law was compelled by three well-established principles of North Carolina law.

First, North Carolina, like most American jurisdictions, has long held that interpretation of an unambiguous insurance policy or contract is a question of law for the court. *E.g., Barbee v. Harford Mutual Ins. Co.*, 330 N.C. 100, 102, 408 S.E.2d 840, 841 (1991); *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 690-91, 340 S.E.2d 374, 377 (1986). No fact issue is present – and extrinsic evidence may not be used to interpret the contract – unless *the court* first decides that the contract is ambiguous. *United States for Westchester Elec. v. Sentry Ins.*, 774 F.2d 80, 84 (4th Cir. 1985) (applying North Carolina law).

Second, under North Carolina law, "[t]he determination whether the terms of a policy are . . . ambiguous is one of law for the court." *Squires v. Textile Ins. Co.*, 250 N.C. 580, 585, 108 S.E.2d 908, 911 (1959). The North Carolina Supreme Court cogently stated the controlling

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coverage. Under North Carolina law, the claimant under an insurance policy bears the burden of proving the material facts relating to coverage. *See, e.g., Kirk v. Nationwide Mut. Ins. Co.*, 254 N.C. 651, 654, 119 S.E.2d 645, 647 (1961) (burden on party claiming benefits under insurance policy to show coverage); *Slaughter v. State Capital Life Insurance Co.*, 250 N.C. 265, 108 S.E.2d 438 (1959) (insurer does not have burden of showing applicable exclusion unless insured first establishes that claim is within coverage); *Walker v. Durham Life Ins. Co.*, 90 N.C.App. 191, 193, 368 S.E.2d 43, 45 (1988).

principle in *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 122 S.E.2d 518, 522 (1970)(emphasis added):

> No ambiguity . . . exists unless, *in the opinion of the court*, the language of the policy is *fairly and reasonably* susceptible to either of the constructions for which the parties contend. [Citation omitted]. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay.

Third, North Carolina law precludes use of parol evidence to create ambiguity. *E.g., S&F Trading Co. v. Carson*, 87 N.C. App. 602, 604, 361 S.E.2d 897, 899 (1987) (rejecting use of extrinsic evidence to create ambiguity as "circular"). North Carolina is not unique. *See, e.g., Burger King Corp. v. Horn & Hardart Co.*, 893 F.2d 525, 527 (2d Cir. 1990) (under New York law, court must determine whether contract is ambiguous by reference to contract alone); *Port of Portland v. Water Quality Insurance Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986) ("We agree . . . that [under Oregon law] parol evidence should not be allowed in for the purpose of creating an ambiguity."); *Amos v. Coffee*, 228 Va. 88, 93, 320 S.E.2d 335, 338 (Va. 1984) (holding, under Virginia law, that " '[p]arole evidence cannot be used to first create an ambiguity and then remove it.' " (quoting *Cohan v. Thurston*, 223 Va. 523, 292 S.E.2d 45, 46 (Va. 1982)); *Phillips v. Union Bankers Ins. Co.*, 812 S.W.2d 616, 620 (Tex. Ct. App. 1991) ("In the absence of ambiguity on the face of the [insurance] contract, parol evidence is not available to create ambiguity."); *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 572, 498 N.Y.S.2d 344, 346,

489 N.E.2d 231, 233 (N.Y. 1986) ("[W]e should determine if there is any ambiguity by the contractual language alone, without reference to extrinsic evidence.").

Accordingly, ERC's motion for summary judgment did not require either the district court or the Fourth Circuit to weigh any evidence or allocate the burden of proof or burden of production. Indeed, that would have been contrary to North Carolina law. Rather, the courts simply had to read the plain English language of the Multimedia Policy and apply it according to its terms, unless *in the court's opinion* the language was ambiguous. Both courts concluded that the language was *not* ambiguous. Hence no fact issue arose.

The cases which Teague cites [Petition for Certiorari at 12-13] do not establish a split among circuits on the standards for summary judgment. For example, Teague cites *Country Floors, Inc. v. Partnership*, 930 F.2d 1056, 1061-62 (3rd Cir. 1991) for the proposition that the Third Circuit endorses weighing of evidence. [Petition at 13.] In fact, the Third Circuit's opinion in *Country Floors expressly rejects* weighing the evidence. 930 F.2d at 1061-62. Nor do any of the other cases cited by Teague endorse weighing the evidence. Teague cites seven cases as opposing weighing and four cases as supporting weighing. [Petition for Certiorari at 12-13.] If the Court were to shuffle those eleven opinions together, it would have difficulty separating them again into the two categories without consulting the Petition. The cases which Teague cites in the two categories are, as groups, indistinguishable.

More important, the cases which Teague cites deal with an issue not present here. Those cases are concerned with the quantum of evidence necessary to create a genuine issue about the existence or non-existence of a *fact*

once it has been determined that the fact is *material* under the controlling substantive law. That issue is not present here because, under controlling North Carolina law, this case presents an issue of law, not a question of fact. In addition, as the Fourth Circuit properly found, North Carolina law prohibits use of the extrinsic evidence proffered by Teague in resolving that question of law.

Thus, in the final analysis, Teague really quarrels with the Fourth Circuit's application of North Carolina law, not with its interpretation of the federal summary judgment standard. As shown, that is not an appropriate basis for certiorari, especially since the Fourth Circuit decided the state law question correctly.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE PLAIN LANGUAGE OF THE MULTIMEDIA POLICY DOES NOT INDEMNIFY JAMES O. BAKKER AGAINST LIABILITY FOR HIS OWN FRAUD.

Although Teague's lengthy state law arguments do not present a proper basis for certiorari, ERC nevertheless responds below to show that the Fourth Circuit and district court correctly applied North Carolina law.

A. North Carolina Law Does Not Permit Creation of Indemnification for Bakker Against Liability for His Own Fraud Through Distortion of the Policy Language.

The Multimedia Policy does not indemnify Bakker against liability for his own fraud. It covers only specified torts, and fraud is not specified. Under North Carolina law, ERC is not liable for a risk it did not assume. *Wachovia Bank & Trust Co.*, 276 N.C. at 354, 172 S.E.2d at 522.

Contrary to Teague's argument, Section I(a)(7) does not indemnify Bakker for the fraud judgment. It plainly covers only *"negligent* error, omission, misstatement or misleading statement" – not *fraudulent* error, omission, misstatement or misleading statement. Teague tries to rewrite Section I(a)(7)'s coverage by arguing that the policy should be read as if "negligent" modifies only "error" rather than the entire phrase which it precedes. This "Teague Revision" ignores the fundamental principle of North Carolina law that insurance policies must be read according to ordinary English usage. *Waste Management*, 315 N.C. at 694, 340 S.E.2d at 379; *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978). As a consequence, courts applying law like that of North Carolina consistently have rejected similar arguments.

In *Golf Course Superintendents Ass'n of America v. Underwriters at Lloyd's, London*, 761 F. Supp. 1485, 1489-90 (D. Kan. 1991), for example, the court rejected, as a matter of law, an insured's claim that virtually identical policy language covered intentional retaliation for filing a civil rights charge:

> The insurance contract covers liability for "wrongful acts" which are defined as *"any negligent act, error, omission, misstatement or misleading statement."* Intentional conduct . . . is not contained in this definition. [Citations omitted.] [The insured] contends that the definition of "wrongful act" is ambiguous and should be liberally construed in favor of [the insured.] [The insured] argues that "negligent" in the phrase "negligent act, error, omission, misstatement or misleading statement" could be interpreted as modifying only the word "act." . . . We disagree . . . . We believe it makes better sense and

> captures the intent of the parties to construe the definition of "wrongful acts" so that the word "negligent" modifies every relevant term of the definition. It would be self-defeating to limit the definition of "wrongful act" to negligent acts, but at the same time cover intentional errors or omissions. [Emphasis added.]

Other courts have reached the same result. *See, e.g., Richards v. Fireman's Fund Ins. Co.*, 417 N.W.2d 663, 667 (Minn. App. 1988) (professional liability policy covering claims for "any negligent act, error or omission" is *clear and unambiguous* and does not cover omission to perform contractual duties unless done negligently); *Employer's Reinsurance Corp. v. Martin, Gordon & Jones, Inc.*, 767 F. Supp. 1355, 1362 n.2, (S.D Miss. 1991) (holding that phrase "negligent act, error or omission of the Insured" includes only *negligent* errors, thus concluding that "negligent" modified all terms in the series); *Reliance Insurance Co. v. General Reinsurance Corp.*, 506 F. Supp. 1042, 1044, 1050 (E.D. Pa. 1980) (holding that endorsement covering "any negligent act, error or omission" does not cover intentional or willful conduct); *School Dist. No. 1 v. Mission Insurance Co.*, 58 Or. App. 692, 701, 650 P.2d 929, 935 (1982) (holding that policy covering claims for "any negligent act, error or omission" does not cover intentional discrimination, only negligent discrimination).

These cases apply the ordinary meaning of the policy language, just as North Carolina law requires. In normal usage, an adjective preceding a conjoined series of nouns modifies each noun in the series. For example:

1. The bakery was filled with delicious cakes, pies, cookies and pastries.
2. Countless judges, lawyers and legal scholars have pondered the meaning of "proximate cause."

No one familiar with English would think that the first illustration means that only the cakes were delicious; nor does the second example mean that only the judges are countless. Rather, the adjective modifies *each* noun (or noun phrase) in the series. Normal usage avoids unnecessary repetition by using the adjective to modify the entire series rather than clumsily repeating it.

The technical term for this common grammatical practice is "ellipsis" or "elliptical construction" – a phrase or sentence in which words are omitted in order to avoid unnecessary repetition. *Sirvint v. Fidelity & Deposit Co.*, 242 A.D. 187, 272 N.Y.S. 555, 557 (N.Y. App. Div. 1934), *aff'd*, 266 N.Y. 482, 195 N.E. 164 (1934); J. Hodges & M. Whitten, *Harbrace College Handbook* 512 (10th ed. 1986). Contrary to the Teagues' contention [Petition for Certiorari at 20], this is not an outdated grammatical concept no longer in use. Indeed, the Teagues themselves use adjectives to modify entire series of nouns. Paragraph 60 of their crossclaim, for example, alleges that Bakker intended to defraud them "by means of *false* or *fraudulent* pretenses, representations, or promises." "False" and "fraudulent" modify all three nouns in the series, not just "pretenses." What's more, Congress uses the same pattern. For example, 18 U.S.C. § 1341 (Supp. 1989) prohibits fraudulent use of "any *counterfeit* or *spurious* coin, obligation, security, or other article . . . " (emphasis added). The underlined adjectives modify all nouns in the series, not just the first term. *Also see, e.g.*, 18 U.S.C. § 1342 (1988); 18 U.S.C. §§ 1341 and 1343 (1988).

The Multimedia Policy itself contains numerous examples of a single adjective modifying a series of nouns. Section I(b)(1) covers "false arrest, detention or imprisonment . . . ." [App. 2.] Plainly, "false" modifies all

three nouns in the series. "False arrest," "false imprisonment" and "false detention" are synonyms for the same tort.[5] Similarly, Section II(a)(5) refers to "bodily injury, sickness, disease or death of any person." The adjective "bodily" in that phrase modifies the entire phrase, not just "injury." *See Chatton v. National Union Fire Ins. Co. of Pittsburgh, PA.*, 10 Cal. App. 4th 846, 13 Cal. Rptr. 2d 318 (1992); *Presidential Hotel v. Canal Ins. Co.*, 188 Ga. App. 609, 611, 373 S.E.2d 671, 672 (1988); *E-Z Loader Boat Trailers v. Travelers Indemn. Co.*, 106 Wash. 2d 901, 908, 726 P.2d 439, 443 (1986) (*en banc*); *Guardian Life Ins. Co. of America v. Richardson*, 129 S.W.2d 1107 (Tenn. App. 1939). At least seven other examples appear throughout the Multimedia Policy [App. 3 (Section I(a)(3) and Section II(a)(2)); App. 4 (Section IV(a)(2) (two examples), Section IV(a)(3), Section IV(c)) and App. 7 (Section X).[6]

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[5] The policy includes all three terms because the same tort is known by differing names in various jurisdictions. *See, e.g., Prosser & Keeton on the Law of Torts* 47 (5th ed. 1984); *Haigler v. City of New York*, 521 N.Y.S.2d 428 (N.Y. App. Div. 1987); *Butler v. City of Vero Beach*, 495 So. 2d 266 (Fla. Dist. Ct. App. 1986); *Keys v. Sambo's Restaurant, Inc.*, 389 So. 2d 1360 (La. Ct. App. 1980), *aff'd*, 398 So.2d 1083 (La. 1981).

[6] Teague's purported counter examples are without merit. For example, Section I(a)(4) – which excludes coverage for liability arising "under any workman's compensation, unemployment compensation or disability benefits law" – does *not* use one adjective to modify a series of nouns. Rather, it contains a series of adjective phrases – "workman's compensation," etc. – that modify the single noun "law." Thus, each adjective phrase is the functional equivalent of a single word. Indeed, they are so commonly used as single words that they have their own dictionary entries. *See, e.g., Webster's Third New International Dictionary* 2635 (defining "workman's compensation insurance");

The North Carolina courts have recognized elliptical phrases in insurance policies. In *Big B Transportation, Inc. v. U.S. Ins. Group*, 93 N.C. App. 233, 234, 377 S.E.2d 278, 279 (1989), the policy covered "liability of the Insured as a carrier under bills of lading or shipping receipts *issued by the Insured* . . . " (emphasis added). The court rejected the insured's contention that the adjective phrase "issued by the Insured" modified only "shipping receipts." The court said that the only *reasonable* way to read the policy was that "issued by the insured" modified *both* "bills of lading" and "shipping receipts" – even though it appeared after only one of the terms. *Id.* at 235, 377 S.E.2d at 279. And *see, Strother v. North Carolina Farm Bureau Mutual Ins. Co.*, 90 N.C. App. 734, 735-36, 370 S.E.2d 82, 83 (1988), *rev. denied*, 323 N.C. 369, 373 S.E.2d 556 (N.C. 1988) (holding that words in an insurance policy modified entire series of nouns, not just immediately adjacent noun).

In short, Section I(a)(7) of the Multimedia Policy follows common English usage – a usage which is (i) repeated throughout the policy, (ii) used in the Teagues' own pleadings and in federal statutes, and (iii) recognized by numerous courts and authorities on usage.

Contrary to Teague's assertion [Petition for Certiorari at 16-18], his strained interpretation does not give significance to each word. As the courts below recognized, the Teague Revision would nullify the word "negligent" in Section I(a)(7). It would be illogical for the policy to limit coverage for "errors" to negligent errors if, as the Teagues contend, it covers all omissions. Just as a surgeon's

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Id. at 2493 (defining "unemployment compensation"). *Cf., Id.* at 642 (defining "disability insurance").

"error" in leaving a sponge inside a patient can be characterized as an omission to remove it, any "error" by a broadcaster can be characterized as an omission, a misstatement or a misleading statement. Thus, the insured could always circumvent the restriction to "negligent error" by characterizing a claim as an omission. *See Golf Course Superintendents*, 761 F.Supp. at 1490 ("[i]t would be self-defeating to limit [coverage] to negligent acts, but at the same time cover intentional errors or omissions.") Common sense compels the conclusion that "negligent" was meant to have practical significance, not the nugatory effect created by the Teague Revision. *See Wachovia Bank*, 276 N.C. at 355, 172 S.E.2d at 522 ("Each word is deemed to have been put into the policy for a purpose and will be given effect, if that can be done by any reasonable construction . . .).

B. The Policy Is Not Ambiguous Under North Carolina Law.

Because Teague cannot seriously argue that a natural reading of Section I(a)(7) indemnifies Bakker for his own fraud, he spends much of his Petition trying to create some imaginary ambiguity which he can exploit to create coverage not contemplated by either ERC or PTL at the policy's inception. The cases cited above reject that contention.

Ultimately, Teague depends on a misconception of "ambiguity" under North Carolina law. Contrary to his apparent belief, a policy is not ambiguous simply because inventive counsel can conceive of a "possible but unlikely meaning [for policy language]." *Port of Portland*, 796 F.2d at 1194 (citing *Western Fire Ins. Co. v. Wallis*, 289 Or. 303,

308, 613 P.2d 36, 38-39 (1980)). Rather, a policy is ambiguous only if it is *reasonably* subject to different interpretations by a person in the place of the insured. *Wachovia Bank*, 276 N.C. at 354, 172 S.E.2d at 522 (quoted at p. 12 above). "The key word in this [principle] is 'reasonably.' " *Radiator Specialty*, 651 F. Supp. at 442.

Thus, Teague cannot establish that Section I(a)(7) of the Multimedia Policy is ambiguous by showing that a strained, distorted reading might lead to a different result. *See Waste Management*, 315 N.C. at 695, 340 S.E.2d at 379 (reinstating summary judgment for insurer with observation that "[a]lthough it is possible to perceive ambiguity in the policy language, it strains at logic to do so.").

Teague tries to circumvent these fundamental principles of North Carolina law by arguing that the policy contains a "latent ambiguity." [Petition for Certiorari at 21-27.] In doing so, however, he proves only that he does not understand what "latent ambiguity" means under North Carolina law. The North Carolina Supreme Court defined "latent ambiguity" in *Redd v. Taylor*, 270 N.C. 14, 22, 153 S.E.2d 761, 766 (1967):

> [a] latent ambiguity occurs when the words of an instrument are plain and intelligible, but extrinsic facts are necessary to identify the person or thing mentioned therein. A latent ambiguity, therefore, presents a question of identity – a fitting of the description in the will to the person or thing the testator intended.

Accord: Queens Ins. Co. of America v. Meyer Milling Co., 43 F.2d 885, 887 (8th Cir. 1930) (cited by Teague). The classic example of latent ambiguity is a contract requiring the purchase of goods "arriving on the ship Peerless from Bombay" when, unknown to the parties, there are two

different ships by that name arriving from Bombay. *E.g., Raffles v. Wichelshause*, 2 Howd. N.C. 906, 159 Eng. Rep. 375 (Ex. 1869).

The North Carolina Supreme Court recently reaffirmed this definition of "latent ambiguity" and emphasized that the latent ambiguity doctrine does *not* permit the use of extrinsic evidence "to alter or affect the construction of [the instrument itself]." *Britt v. Upchurch*, 327 N.C. 454, 458, 396 S.E.2d 318, 320 (1990).

In this case, Teague is not trying to use extrinsic evidence to resolve a latent ambiguity. That is, he is not using the evidence to identify a person or thing to which the policy refers. Rather, he attempts to use it to argue that the policy's words mean something other than their ordinary meaning – he seeks to use extrinsic evidence "to alter or affect the construction" of the policy. This is exactly what the North Carolina Supreme Court's decision in *Britt* says that he cannot do.

C. The Lower Courts Properly Rejected Teague's Attempt To Find Ambiguity Through Strained Reading And Irrelevant Extrinsic Evidence.

1. It Is Irrelevant That Other Policy Provisions Create Other Types Of Coverage.

Contrary to Teague's argument [Petition for Certiorari at 21], he is not helped because parts of the Multimedia Policy *other than Section I(a)(7)* cover libel, invasion of privacy and other torts generally categorized as "intentional." Not even Teague contends that fraud is one of the "intentional" torts specified in Sections I(a)(1)-(6). Rather, he relies solely on Section I(a)(7) which expressly covers only negligent conduct. It makes no sense for Section

I(a)(7) to begin with the word "negligent" if, as Teague argues, it was intended to cover intentional conduct.

2. The Absence Of A Fraud Exclusion Is Irrelevant Unless The Coverage Provision Creates Fraud Coverage.

Teague is also wrong in arguing that ERC must indemnify Bakker for his fraud because the policy does not expressly exclude fraud. [Petition for Certiorari at 20-21.] Under North Carolina law, analysis must begin with the coverage section. The policy is for specific perils: it covers a claim only if it falls within the coverage affirmatively granted. *See, e.g., Wachovia Bank*, 276 N.C. at 358, 172 S.E.2d at 525 (holding that absence of express exclusion of cumulating limits of "medical payments" provision did not expand coverage beyond affirmative grant of coverage); *Slaughter*, 250 N.C. at 269, 108 S.E.2d at 441 (insurer does not have burden of showing applicable exclusion unless insured first establishes that claim is within coverage; *either* lack of coverage *or* exclusion would preclude claim).[7]

Many other jurisdictions agree with North Carolina on this point. *See, e.g., American Home Assurance Co. v. Osbourn*, 47 Md. App. 73, 82, 422 A.2d 8, 14 (Md. Ct. Spec.

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[7] Nor does the exclusion for criminal fines and penalties make absence of an express fraud exclusion significant. [Petition for Certiorari at 20-21.] That exclusion is necessary because some of the torts expressly covered – *e.g.*, trespass – could result in "criminal" fines or penalties in some jurisdictions. In contrast, since fraud is *not* a specified tort, the policy does not need to exclude it. *Cf. LeDoux v. Iowa Nat. Mut. Ins. Co.*, 262 N.W.2d 418, 421 (Minn. 1978) (exclusions have no bearing on whether coverage sections are ambiguous).

App. 1980) (holding that issue of exclusion was irrelevant, since coverage clause did not create coverage); *Smith v. Nationwide Mut. Ins. Co.*, 214 Conn. 734, 741, 573 A.2d 740, 743 (1990) (whether claim covered was "a question of coverage, not exclusion"); *McMahon v. Boston Old Colony Ins. Co.*, 67 A.D. 2d 757, 758, 412 N.Y.S.2d 465, 467 (N.Y. App. Div. 1979) ("[B]efore the need for an exclusion arises, there must first be coverage. . . . "); *Urtado v. Shupe*, 33 Colo. App. 162, 165, 517 P.2d 1357, 1359 (1973), *aff'd en banc*, 187 Colo. 24, 528 P.2d 222 (1974) ("[I]t is not necessary that all limitations [on coverage] appear as exclusions . . . ."); *Golf Course Superintendents*, 761 F. Supp. at 1490 ("[t]he policy should *not* be construed only in light of what is expressly excluded. . . . ").

3. Language In Other ERC Policies Is Irrelevant.

There is no merit to Teague's argument that the Multimedia Policy is ambiguous because *other types* of ERC policies have different coverage provisions or express fraud exclusions. The North Carolina Supreme Court rejected a similar argument in *Wachovia Bank*, 276 N.C. at 358, 172 S.E.2d at 525. In that case, the court rejected the argument that the insurer's addition of exclusionary language to later versions of the same policy constituted evidence that the earlier version without the exclusionary language was ambiguous:

> Nor does the fact that the company has now included such provision in the medical payments section [of other policies] show that it recognized a pre-existing ambiguity therein. *To insert a provision which will eliminate the remotest possibility of litigation upon a given theory is not to*

> *be deemed a recognition of the reasonableness of such theory in the absence of such provision in the policy.*

276 N.C. at 358, 172 S.E.2d at 525. (emphasis added). *Accord: Nationwide Mut. Ins. Co. v. Akers*, 340 F.2d 150, 156 (4th Cir. 1965) (Virginia law) (rejecting contention that subsequent revision of statutory policy form to expressly exclude certain coverage created inference that such coverage existed under the old form).

Thus, under North Carolina law, interpretation of PTL's Multimedia Policy would not be affected even if ERC (contrary to fact) had subsequently revised its multimedia policy form to include an express fraud exclusion. *A fortiori*, it is irrelevant that some ERC policies *other than the multimedia form* have an express fraud exclusion.

4. Teague's Purported Expert Affidavits Are Irrelevant.

Teague improperly attempts to create ambiguity through purported "expert" affidavits which are little more than briefs in affidavit form. The "experts" merely render opinions about whether the policy language is ambiguous or what it means. Under North Carolina law, these were legal issues for the courts to decide.

As succinctly stated in *Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co.*, 475 F. Supp. 586, 592 (W.D. Pa. 1979), *modified on other grounds*, 632 F.2d 1068 (3rd Cir. 1980), *cert. denied*, 451 U.S. 986 (1981):

> Complaint is made of exclusion of expert testimony of witness Ron Rodda who was called to interpret the meaning of the insurance contract. This is not permitted. The interpretation of the insurance contract is a matter for the court . . . . There is nothing in Rule 702 which would allow

> an expert to interpret a legal document and substitute his judgment for that of the court.

Accord: Loeb v. Hammond, 407 F.2d 779, 781 (7th Cir. 1969) (holding that expert testimony is not permitted with respect to interpretation of contract); *County of Erie v. American States Ins. Co.*, 573 F. Supp. 479 (W.D. Pa. 1983) *aff'd.*, 745 F.2d 45 (3rd Cir. 1984) (holding that affidavit of purported expert on interpretation of policy language did not preclude summary judgment for the insurer); *Radiator Specialty*, 651 F. Supp. at 443 (expert affidavit purporting to interpret policy did not preclude summary judgment under North Carolina law). *Cf. Chatton v. National Union Fire Ins. Co. of Pittsburgh, P.A.*, 13 Cal. Rptr. 2d at ___ (opinion evidence not admissible to interpret unambiguous policy language). This authority is consistent with the North Carolina substantive rule that extrinsic evidence may not be used to modify policy language.

Although state law is conclusive, the same result would apply under the Federal Rules of Evidence. *E.g., Marx & Company, Inc. v. The Diners' Club, Inc.*, 550 F.2d 505, 509 n.11 (2d Cir. 1977), *cert. den.*, 434 U.S. 861 (1977); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 365-68 (4th Cir. 1986).

5. The Testimony Of Other Witnesses Is Irrelevant and Does Not Support Teague.

The North Carolina rule prohibiting use of extrinsic evidence to interpret or create ambiguity in plain contract language is fatal to Teague's reliance on deposition testimony to influence the court's decision of the legal issue in this case. *See Chatton*, 13 Cal. Rptr. at ___ (alleged admissions of insurer's employees that policy covered claim not admissible to change policy's plain meaning).

Moreover, Teague's Petition simply mischaracterizes that testimony.

The eighteen depositions taken by the Teagues reflect that PTL did not intend to buy and ERC did not intend to sell fraud coverage. *No deponent testified that he or she understood the Multimedia Policy to cover common law fraud.* To the contrary, those deponents who expressed an opinion – including Dave Cadwell who bought the policy for PTL – testified that they did not believe that it covers fraud. [App. 68-75, 113-27.] Mr. Cadwell clearly indicated that he understood the policy to cover only negligent acts, not intentional acts. [App. 759 (¶¶ 14-15); App. 113-27.] So did Mr. Heidenreich, another of PTL's agents. [App. 68-75.]

6. Teague May Not Use Non-Existent Facts To Support His Petition.

Teague's Petition is replete with non-sequiturs and "factual" statements which are not supported by the record. Those misstatements would not change the result of the case even if they were true, but they are not true. Space does not permit discussion here of all such mischaracterizations of the record. A few examples will suffice.

Teague falsely claims that ERC charged PTL a higher premium in exchange for shifting from the Broadcaster's Broadform (which Teague admits does *not* cover fraud) to the multimedia form. [Petition for Certiorari at 3, 6, 14, 17, 18, 19 and 29.] That argument is pure fantasy unsupported by any evidence. The record is undisputed that world-wide coverage was quoted *and bound* as "Broadcasters Broadform" coverage for a premium of $42,187. [App. 436 and 435.] The policy was then issued on the

multimedia form *with no increase in premium*. [*Compare* App. 435 and 436 (quote and binder for Broadcaster's Broadform) *with* App. 1 (Multimedia Policy Declarations).]

The cheaper quotation cited by the Teagues shows on its face that it was for coverage *limited to the United States and Canada*. [App. 437; *see also* App. 436.] In contrast, the coverage as bound was for *worldwide coverage*. [App. 1; 435.] Obviously worldwide libel coverage is more expensive than coverage for the United States and Canada only – especially since many foreign countries lack the First Amendment and due process protections available in this country. There is not a scrap of evidence that ERC charged a higher premium for shifting from broadcaster's broadform or for fraud coverage. No witness so testified. Dave Cadwell, who purchased the policy for PTL, certainly did not think that the premium was increased in exchange for fraud coverage. [App. 97-99; 120-29; 759.] Indeed, the shift from Broadcaster's Broadform to the multimedia form with no premium increase confirms that PTL did not pay for fraud coverage.

Teague states that ERC's underwriter, agent and attorney all admitted that the language was ambiguous. [Petition for Certiorari at 4, 26-27] This is false. Similarly, Teague claims that ERC's "agents" admitted coverage of non-negligent misstatements and one "even admitted the possible coverage of the Teague Class Action." [Petition for Certiorari at 4, 26-27] This is wrong. Not only does Teague mischaracterize the testimony, but there is no evidence that the "agents" were agents of ERC.

Even if North Carolina law permitted use of extrinsic evidence to avoid the plain terms of the policy, these and other unsupported statements in Teague's Petition for

Certiorari would not be probative. All of this purported "evidence" was argued to the Fourth Circuit.[8] Mischaracterizations of the record in a party's brief are not evidence and cannot create a material issue of fact – even if, contrary to North Carolina law, it were otherwise proper to modify a written insurance policy by extrinsic evidence.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied. This case does not present any substantial question of federal law. The unreported *per curiam* decision of the Fourth Circuit rests solely on state law, and Teague simply seeks an opportunity to rehash the same state law issues before this Court. That is not an appropriate use of the certiorari jurisdiction, and it should be rejected.

Respectfully submitted, this the 15th day of December, 1992.

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[8] Teague's false allegation that ERC withheld certain documents during discovery was briefed to and implicitly rejected by both courts below. The documents were produced to both sides by PTL, and Teague admitted in the courts below that his counsel had one of the documents for two years and simply forgot about it.